Supreme Court, U.S.
FILED

071328 APR 18 2008

OFFICE OF THE CLERK

90

(1)

No. 07-

IN THE

Supreme Court of the United States

ROSA ACUNA, INDIVIDUALLY,

Petitioner,

v.

SHELDON C. TURKISH, M.D., AND THE OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

HAROLD J. CASSIDY
HAROLD J. CASSIDY & ASSOCIATES
Attorneys for Petitioner
750 Broad Street
Suite 3
Shrewsbury, NJ 07702
(732) 747-3999

215001

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Under New Jersey Law, a physician must disclose all facts that a reasonable patient would consider significant concerning the nature of a medical procedure proposed by the physician, the risks of that procedure, and the alternatives to the procedure. In the case of a patient who is a pregnant woman, under New Jersey Law, the physician has a legal and professional duty to two separate patients, the mother and her unborn child. The physician's duty to the child encompasses a duty to disclose to the child the risks or impact of the procedure upon the unborn child; a duty that is discharged by the physician by making those disclosures to the mother who must make an informed decision for her child, as well as herself.

Under New Jersey Law, if a patient asks a question about a matter that he did not have to disclose in the first instance, the physician is required to answer the question truthfully and in a non-misleading fashion. If he fails to do so, he is liable to the patient if the information had the capacity to induce a consent the patient would not have otherwise given. Under New Jersey Law, it is for the jury, not the court, to decide what a reasonable patient would consider significant and what disclosures are factually accurate.

In the current case, Petitioner, Rosa Acuna, was a 29 year old married mother of two young daughters who, because of abdominal pain, went to her regular gynecologist who determined she was pregnant and recommended she terminate her pregnancy. The doctor failed to disclose the nature of the procedure or anything

at all about the unborn child. Mrs. Acuna asked her doctor "is my baby already there?" wanting to know if there was a human being already in existence, in the biological sense. The physician misrepresented the facts and told her "Don't be stupid, it is nothing but some blood." As a result of the negligence of the physician, Mrs. Acuna submitted to the procedure to which she would not have consented if she was provided with accurate factual information.

1. Does *Roe v. Wade* hold that whether or not a fetus or embryo is a human being, as a matter of biological fact, a member of the species *Homo sapiens*, is not a question of fact that can be determined in a state court trial as decided by the New Jersey Supreme Court in this case, *Acuna v. Turkish*, 930 A.2d 416 (N.J. 2007); or is *Roe v. Wade* correctly understood to mean this Court never addressed the question of whether the embryo and fetus is a human being, and that question can and should be treated as a question of fact for a fact finder, as held by the U.S. Court of Appeals for the Third Circuit in *Alexander v. Whitman*, 114 F.3d 1392 (3rd Cir. 1997)?

2. Did the New Jersey Supreme Court violate Rosa Acuna's right to due process under the Fourteenth Amendment when it denied Mrs. Acuna a trial to prove the fact that the abortion procedure performed upon her, without informed consent, terminated the life of an entire human being as a matter of biological fact?

3. Did New Jersey violate Mrs. Acuna's Fourteenth Amendment right to the equal protection of the laws by refusing to impose on Dr. Turkish the same duty to disclose to Mrs. Acuna, the impact on her unborn child, the doctor's second patient, that New Jersey requires physicians to make to all other pregnant mothers?

4. Did New Jersey violate Mrs. Acuna's Fourteenth Amendment right to the equal protection of the laws by refusing to impose the *Howard Standard* that requires the physician to answer patients' questions truthfully and in a non-misleading manner to a woman in her circumstances, when that standard is imposed in all other circumstances?

PARTIES TO THE PROCEEDINGS

The Petitioner is Rosa Acuna, the mother of an unborn child designated Andres Acuna. She is the Plaintiff who brought a tort action against her obstetrician for his negligence in performing an abortion without obtaining an informed consent for the procedure in accordance with New Jersey Law.

The Respondents are Dr. Sheldon C. Turkish, M.D. (Mrs. Acuna's regular gynecologist and obstetrician) and the Obstetrical and Gynecological Group of Perth Amboy-Edison, a partnership in which Dr. Turkish is a partner. There are no known subsidiaries or other legal entities associated with the Obstetrical and Gynecological Group of Perth Amboy-Edison.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	v
TABLE OF APPENDICES	viii
TABLE OF CITED AUTHORITIES	ix
ORDERS AND OPINIONS DELIVERED IN THE CASE	1
STATEMENT OF JURISDICTION	2
STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. The Nature of the Action and Procedural History	3
B. Statement of Facts	5
REASONS FOR GRANTING THE PETITION	14
INTRODUCTION: RELEVANT STATE AND FEDERAL LAW	15

Contents

Page

A. The Relevant New Jersey Tort Law – Uninformed Consent Negligence 15

(1) General Principles of Informed Consent 15

(2) The Standard to be Applied When a Patient Asks for Information 16

(3) What Disclosures Should Be Made, and Whether the Physician's Statement In Answer to the Patient's Questions Are Truthful, Are Questions of Fact To Be Determined by a Jury, Not the Court 17

B. Three Fundamental Liberty Interests of Mrs. Acuna Protected by the Due Process Clause of the Fourteenth Amendment are Implicated in this Case 19

I. There Is a Conflict Between the Decisions of the U.S. Court of Appeals for the Third Circuit and the New Jersey Supreme Court Concerning the Interpretation of this Court's Decision in *Roe V. Wade*. The Issue Implicates the Fundamental Rights of Millions of Women. This Court Should Resolve this Conflict. 21

Contents

Page

II. Denying Plaintiff a Trial Violated her Right to Due Process 27

III. New Jersey's Decision That the Physician Did Not Have to Disclose the Impact of the Procedure upon Mrs. Acuna's Unborn Child, and the Court's Failure to Impose the *Howard* Standard to Her Case, Each Violated Mrs. Acuna's Equal Protection Rights. 33

CONCLUSION 35

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of New Jersey Decided September 12, 2007 ..... 1a

Appendix B — Opinion Of The Superior Court Of New Jersey, Appellate Division Decided April 7, 2006 ..... 26a

Appendix C — Opinion Of The Superior Court Of New Jersey, Law Division, Middlesex County Decided March 3, 2004 ..... 41a

Appendix D — Opinion Of The Superior Court Of New Jersey, Appellate Division Decided October 29, 2002 ..... 68a

Appendix E — Order For Partial Summary Judgment As To The First, Second, Third, Fourth And Fifth Counts Of The Amended Complaint Of The Superior Court Of New Jersey, Law Division, Middlesex County Filed June 6, 2001 ..... 90a

Appendix F — Letter Opinion Of The Superior Court Of New Jersey Dated May 1, 2001 .... 92a

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Acuna v Turkish,
930 A.2d 416 (N.J. 2007) ..... *passim*

Acuna v Turkish,
808 A.2d 149 (N.J. App. Div. 2002) (*Acuna* I)
..... 1, 4, 5, 15, 24

Acuna v. Turkish,
894 A.2d 1208 (N.J. App. Div. 2006) (*Acuna* II)
..... 1, 4, 5, 15

Alexander v. Whitman,
114 F.3d 1392 (3rd Cir. 1997) ..... ii, 14, 21, 22

Armstrong v. Manzo,
380 U.S. 545 (1965) 27

Bell v. Barson,
402 U.S. 535 (1971) 27

Brill v . Guardian Life Ins. of Amer.,
666 A.2d 146 (N.J. 1995) *27*

Caban v. Mohammed,
441 U.S. 380 (1979) 17, 20

Caputo v. Antiles,
686 A.2d 356 (N.J. App. Div. 1996) 17

Cited Authorities

Page

Carey v. Lovett,
622 A.2d 1279 (N.J. 1993) 3, 15

Clark v. Jeter,
486 U.S. 456 (1988) 34

Cruzan by Cruzan v. Director, MO. Dept. Of Health,
497 U.S. 261 (1990) 21

Doe v. Bolton,
410 U.S. 179 (1973) 21

Draper v. Jasionowski,
858 A.2d 1141 (N.J. 2004) 15, 16, 33

F.S. Ryster Guano Co. v. Virginia,
253 U.S. 412 (1920) 33

Geler v. Akawie,
818 A.2d 402 (N.J. App. Div. 2003) 18

Giardina v. Bennett,
545 A.2d 139 (N.J. 1988) ..... *passim*

Griffin v. Illinois,
351 U.S. 12 (1956) 33

Gomez v. Perez,
409 U.S. 535 (1973) 28

Cited Authorities

Page

Howard v. Univ. of Med. and Dent. of N.J.,
800 A.2d 73 (N.J. 2002) 16, 17, 33, 34

Hummel v. Reiss,
608 A.2d 1341 (N.J. 1992) 15

Largey v. Rothman,
540 A.2d 504 (N.J. 1988) 15, 17

Lehr v. Robertson,
463 U.S. 248 (1983) 17, 20

Logan v. Zimmerman Brush Co.,
445 U.S. 422 (1982) 27, 28

Martinez v. California,
444 U.S. 277 (1980) 27

Matthies v. Mastromonaco,
733 A.2d 456 (N.J. 1999) 18

Meyer v. Nebraska,
262 U.S. 390 (1923) 19, 20

Moore v. City of East Cleveland,
413 U.S. 494 (1977) 19

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 27

Cited Authorities

Page

Niemiera by Niemiera v. Schnieder,
555 A.2d 1112 (N.J. 1989) 17

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 19, 20

Planned Parenthood of S.E. PA v. Casey,
505 U.S. 833 (1992) 14, 21, 25, 26

Planned Parenthood v. Rounds,
467 F.3d 716 (8th Cir. 2006) 30

Plyer v. Doe,
457 U.S. 202 (1982) 33

Portee v. Jaffee,
417 A.2d 521 (N.J. 1980) 3, 11, 33

Procanik v. Cillo,
478 A.2d 755 (N.J. 1984) 15

Quilloin v. Walcott,
434 U.S. 246 (1978) 20

Roe v Wade,
410 U.S. 113 (1973) ..... *passim*

Santosky v. Kraemer,
455 U.S. 745 (1982) 17, 19

Cited Authorities

Page

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 19

Stanley v. Illinois, 405 U.S. 645 (1972) 20

Troxel v. Granville, 530 U.S. 57 (2000) 19, 20

Weber v. Aetna, 406 U.S. 164 (1922) 34

Winston v. Lee, 470 U.S. 753 (1985) 21

Statutes Cited:

28 U.S.C. § 1257 2

Other Authorities:

Tussman and ten Broek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949) 33-34

Scientific and Medical Authorities:

American College of Obstetricians & Gynecologists, *Ethics in Obstetrics and Gynecology*, 34 (2d Ed. 2004) 16

Harrison, *et al.*, *The Unborn Patient*, 2d Ed. W.B.Saunders, Phil. 1991 16

ORDERS AND OPINIONS DELIVERED IN THE CASE

On May 1, 2001, the Law Division of the Superior Court of New Jersey issued an opinion holding that the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), prohibited the State of New Jersey from recognizing Mrs. Acuna's legal claim because the Law Division held that *Roe* prohibited the state from recognizing that her unborn child in utero is a human being or family member as a matter of biological fact. (See, opinion of Law Division at A92; order dated June 6, 2001 at A90).

The Appellate Division issued an opinion on October 29, 2002 reversing the Law Division's dismissal of the Emotional Distress Claim on the grounds that the death of the unborn child which ensued in utero was recognized under New Jersey Law as the death of a family member. *Acuna v. Turkish*, 808 A.2d 149 (N.J. App. Div. 2002) (*Acuna I*) at A68. Upon remand, the Emotional Distress Claim was dismissed a second time, on March 3, 2004. (See, March 3, 2004 Opinion of Law Division at A 41). Upon appeal, on April 7, 2006, the Appellate Division reversed the Law Division a second time. See, *Acuna v. Turkish*, 894 A.2d 1208 (N.J. App. Div. 2006) (*Acuna II*), at A26.

The New Jersey Supreme Court granted Defendants' petition for Certification. That Court issued an opinion on September 12, 2007, reversing the Appellate Division's decision in *Acuna II*, stating that this Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973) supported the conclusion that the unborn child is not a

human being, as a matter of fact. *Acuna v. Turkish*, 930 A.2d 416 (N.J. 2007) at A1.

By order filed on November 20, 2007, the New Jersey Supreme Court denied Plaintiff's motion for reconsideration. Order at A96. Justice David Souter extended the time for Petitioner to file her Petition for Certiorari to and including April 18, 2008.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court issued an opinion reversing the Appellate Division on September 12, 2007 and denied Plaintiff's timely motion for reconsideration on November 20, 2007.

This Court has jurisdiction under 28 U.S.C. § 1257. By order of U.S. Supreme Court Justice David Souter, the time to file this petition was extended to Friday, April 18, 2008.

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

A. The Nature of the Action and Procedural History

Petitioner, Rosa Acuna, brought a medical malpractice claim against Defendants, seeking damages for her emotional distress due to the injury and death of her child who died in utero during an abortion performed by Defendants without obtaining informed consent. The Emotional Distress Claim, to be recoverable in New Jersey, required proof of the death of a family member. Under New Jersey Law, death of an unborn child in utero is recognized as a death of an actual family member for the purposes of the Emotional Distress Claim. See, *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) and *Carey v. Lovett*, 622 A.2d 1279 (1993), applying the emotional distress principles first enunciated in *Portee v. Jaffee*, 417 A.2d 521 (1980) to the emotional distress of a pregnant mother whose unborn child is tortiously injured and killed in utero.

The Law Division dismissed Mrs. Acuna's claim for emotional distress on the basis that *Roe v. Wade*, 410 U.S. 113 (1973) held that the unborn child was not a "constitutional person" and for that reason the state was prohibited from recognizing a claim that required proof of the death of a human being where the death occurred in utero. See, Law Division opinion dated May 1, 2001 at A92.

The Appellate Division reversed the Law Division, holding that the death of an unborn child in utero, at any age of gestation, was the death of a family member for purposes of Mrs. Acuna establishing an Emotional

Distress Claim as established by *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988). See, *Acuna v. Turkish*, 808 A.2d 149 (N.J. App. Div. 2002) (*Acuna I*) at A68.

On remand, Mrs. Acuna's emotional distress claim was dismissed a second time. The second Judge, relying in large part on *Roe v. Wade*, concluded that the question of whether the unborn child is a human being (a member of the species *Homo sapiens*) was not a question of fact because such a conclusion was just a "value judgment." Slip opinion found at A41.

On appeal, the Appellate Division reversed the dismissal of the Emotional Distress Claim a second time. *Acuna v. Turkish*, 894 A.2d 1208 (N.J. App. Div. 2006) (*Acuna II*) at A26. The New Jersey Supreme Court granted Defendants' certification and reviewed the case on both the briefs filed in the Appellate Division, and supplemental briefs in the Supreme Court. On September 12, 2007, the New Jersey Supreme Court reversed the Appellate Division and reinstated the order granting summary judgment dismissing the complaint. A timely motion for reconsideration was denied by the New Jersey Supreme Court by order filed on November 20, 2007. On January 24, 2008, Justice Souter extended the time for Rosa Acuna to file this petition to and including April 18, 2008.

The constitutional issues identified in the first question presented were raised at all stages of this case. In the Law Division, Plaintiff raised it in her brief before Judge Hague. Judge Hague's opinion, at A92, addresses directly. Plaintiff's brief in support of her Motion for Reconsideration before that court, addressed that issue

at P.20 to 25. On appeal, the issue was addressed in Plaintiff's briefs on a motion for leave to appeal (Point I), and in the main Appellate Brief once leave was granted (Point I, p.14 to 31). The Appellate Division addressed the issue at length. *Acuna I*, 808 A.2d at 156 to 158. On remand, the same issue arose and is addressed throughout the court's opinion, specifically at Appendix C, A58 to A62.

That issue was again raised on the second appeal in Plaintiff's briefs. That court adopted the ruling in *Acuna I*. The New Jersey Supreme Court decided the issue at 930 A.2d 425 to 428. The equal protection and due process arguments identified in Questions II, III, and IV were raised throughout the case, e.g. in the Appellate Division and Supreme Court in the Appellate Division (*Acuna II*) brief before both courts (Point II, P.49 to 61). They are also argued in the Motion for Reconsideration (Pt. III, P.24-25; Due Process, need for jury trial Pt.I & Pt.II P.2 to 23). The New Jersey Supreme Court failed to address any of the issues raised by Questions II, III and IV.

B. Statement of Facts

On April 6, 1996, Rosa Acuna was a twenty-nine year old married mother of two daughters, ages two and a half years and nine and a half months. Dep. Of Rosa Acuna, P. 8 L. 6 to 7; P. 10 L.5 to P. 11 L.5, at Pa 102 to 104. As of that date the defendant, Dr. Sheldan Turkish, had acted as Mrs. Acuna's regular gynecologist for five years and had delivered Mrs. Acuna's second daughter nine and a half months earlier by repeat Caesarean section. See, Acuna Dep., P. 64 L. 9 to P. 71 L. 24, at

Pa 105 to 112; See, Turkish office chart at Pa 113 to 123 (June 21, 1995). Mrs Acuna went to see Dr. Turkish on April 6, 1996 because she was having constant abdominal pain. Acuna, P.147 L.3 to P.148 L.11, at Pa 139 to 140. The defendant examined the plaintiff and conducted an ultrasound which revealed that Mrs. Acuna was pregnant with her third child. Turkish, P.57 L.1 to P.58 L.16, at Pa 129-130; ultrasound, at Pa 131. When she originally went to Dr. Turkish on April 6, Mrs. Acuna neither knew nor suspected that she was pregnant, and learned that she was pregnant only after his examination and the ultrasound, and was "surprised" to learn of it. Acuna, P. 147 L.3 to P. 148 L. 11, at Pa 139 to 140; P. 161 L. 14 to 20, at Pa 160.

After advising Mrs. Acuna that she was pregnant, Dr. Turkish told her that for health reasons she should have an abortion. Acuna, P. 109 L.6 to 10, at Pa 154; P. 158 L.23 to P. 159 L.3, at Pa 141-142; P. 161 L. 14 to 20, at Pa 160. When Dr. Turkish discussed the abortion with her on April 6, Mrs. Acuna wanted to know one fact before she would consider signing a consent. Mr. Acuna asked Dr. Turkish if her "baby was already there". She wanted to know if there was already an existing human being. Acuna, P. 108 L.4 to P. 111 L. 16, at Pa 153 to 156; P.146 L. 12 to 17, at Pa 157; see, certification of Acuna at Pa 199. If she knew that the abortion procedure terminated the life of a living human being, in the biological sense, she would never have consented to it. Acuna at Pa 199; Acuna, P. 146 L.12 to 17, at Pa 157; P. 108 L.4 to P. 111 L.16, at Pa 153 to 156.

On April 6, 1996 Dr. Turkish stated that the unborn child was not in existence, and there was no human

being. According to Mrs. Acuna, Dr. Turkish answered her question by telling her "Don't be stupid, it is nothing but some blood." Acuna, P. 108 L.4 to P. 111 L.16 at Pa 153 to 156; P. 179 L.18 to 21, at Pa 158; P. 160 L.19 to P. 161 L.20, at Pa 159-160; Cert. of Acuna, at Pa 199-200. According to Dr. Turkish, if she asked him the question as she said she did, he would have told Mrs. Acuna that "it was only some tissue". He stated that he believed he told her it was not a human being. Dep. of Turkish, P. 165 L.10 to 21; Turkish, P. 166 L.11 to 16, at Pa 163-164; P. 102 L.20 to P.103 L.21, at Pa 165-166. Dr. Turkish's statements which denied that Mrs. Acuna's unborn child was already there or in existence were totally false (discussion below). The fact that the child was already in existence and that the abortion would terminate the life of an existing living human being was not only relevant to Mrs. Acuna's decision of whether or not to have an abortion, it was dispositive as the single determining factor. Acuna Cert., at Pa 199-200.

By depriving Mrs. Acuna of accurate biological facts, Dr. Turkish forced her to make a decision which affected the waiver of her own constitutionally protected interest in her existing relationship with her child, as well as interests personal to the child, without information necessary to reach a reasoned decision. See, Cert. of Dr. Nathanson at Pa 469, 470, 479-481. As a consequence she did not know that the doctor would be terminating the life of a human being already in existence. It is common when contemplating an abortion for a woman to want to know whether or not there is already a human being in existence, and women place importance on that fact. See, Cert. of Everett, at Pa 392-393; Pa 397 to 399. The plaintiff can prove to a jury that a reasonable patient

in Mrs. Acuna's position would consider the fact that the abortion procedure terminates the life of a living human being , (a member of the species *Homo sapiens*), material to a decision of whether or not to have the procedure. On April 9, 1996, Mrs. Acuna returned to Dr. Turkish's office and signed a "consent form" which read in its entirety:

> I hereby give my consent for Dr. Turkish to perform a TOP. He has explained all of the risks and complications to me.

See, Pa46.

The staff member who gave Mrs. Acuna the consent form, Jenny Perez, did not explain anything about the abortion procedure prior to her having Mrs. Acuna sign the "consent form," because, according to Mrs. Perez, she is neither trained nor qualified to counsel a woman considering an abortion. Dep. of Perez, P. 25 L.4 to P. 31 L. 22, at Pa 143 to 149. The only other employee of Dr. Turkish who saw Mrs. Acuna on April 9, 1996, was Brenda Salerno, who, like Jenny Perez before her, did not advise or counsel Mrs. Acuna about the nature of the abortion procedure or any facts relevant to Mrs. Acuna's decision because she was neither trained nor qualified to provide such counseling. Dep. Of Salerno, P. 33 L.3 to P. 34 L. 13, at Pa 151-152.

Other than the "consent form" (at Pa 46), no forms or written information or questionnaires were given to Mrs. Acuna to read or fill out. Dep. Of Turkish, P. 14 L.15 to 25, at Pa 150.

On April 9, 1996, the age of Mrs. Acuna's unborn baby was at least seven to eight weeks post-conception. (See detailed factual analysis at Pa 53 (bottom) to Pa 58 (middle)). The abortion was performed by Dr. Turkish that day at his office in Perth Amboy. Turkish, P.15 L.15 to P.17 L.25, at Pa 124 to 126, P. 26 L.17 to 25, at Pa 127. Dr. Turkish admitted that the vacuum aspiration procedure used on April 9th "in fact, kills the fetus." See, Dep. of Turkish, P. 259 L.22 to P. 260 L.8, at Pa 501 (bottom) to 502.

Following the abortion of April 9th Mrs. Acuna experienced bleeding for almost four weeks until she had a massive hemorrhage. On May 5, 1996, she was rushed to Robert Wood Johnson University Hospital emergency room where she was admitted. Acuna, P. 187 L.10 to P. 188 L.16, at Pa 167-168; P. 190 L.23 to P. 191 L.9, at Pa 169-170; see, Hospital Records showing diagnosis of "Incomplete Abortion", at Pa 171.

While in the emergency room Mrs. Acuna asked the nurse what was wrong with her and the nurse told Mrs. Acuna "They left part of your baby in you." Acuna, P. 187 L.10 to P. 188 L.16, at Pa 167-168; P. 83 L.2 to P. 84 L.9, at Pa 172-173. After undergoing a D.&C. Mrs. Acuna went home. She could not reconcile what Dr. Turkish had told her - that the baby was not there, only some blood - and the statement of the nurse that part of her baby was left in her. Mrs. Acuna then went to some libraries to read texts dealing with human development and consulted other persons. Acuna, P. 83 L.2 to P. 84 L.9, at Pa 172-173. At some point thereafter, Mrs. Acuna realized and concluded that Dr. Turkish misrepresented the facts to her, and that a human being was in fact in

existence on April 9th and Dr. Turkish terminated the life of a living human being. Acuna, P. 195 L.3 to P. 196 L. 25, at Pa 174-175.

It is beyond reasonable dispute that the abortion procedure performed by Dr. Turkish on April 9, 1996 terminated the life of a living human being. See, and compare Certification and Expert Report of Dr. David Mark (Molecular Biologist), at Pa 222-258; Certification and Expert Report of Dr. Marie Peeters-Ney (Expert in Human Genetics), at Pa 259 to 280; Certification and Expert Reports of Dr. Bruce Carlson (Human Embryologist), at Pa 281 to 320; Certification and Expert Reports of Dr. Ola Saugstad (Neonatologist), at Pa 400 to 446; Certification and Expert Report of Dr. Jacob Langer (Expert in Fetal Surgery), at Pa 321 to 360; Certification and Expert Reports of Dr. Gabriella deVeber (Pediatric Neurologist), at Pa 361 to 391; Certification and Expert Reports of Dr. Nathanson, at Pa 469 to 482; and Certification and Expert Report of Carol Everett (expert in procedures and practices of abortion providers), at Pa 392 to 399.

The fact that the unborn child between four and eight weeks post-conception is, in fact, a living human being in the scientific and biological sense, is universally known among the scientific and medical community. See, Saugstad, at Pa 445-446. It was universally known among abortion providers even in the 1980's. See, Everett, at Pa 392 to 399. Thus, the plaintiff will be able to prove at trial, the fact that Mrs. Acuna's child was an existing human being on April 9, 1996 and the abortion procedure terminated the life of a living human being. Those facts are relevant to: (1) the liability

question of whether that fact should have been disclosed; (2) whether Defendants' answer that there was "only some tissue," was truthful and non-misleading; and (3) that there was a death of a family member to establish the *Giardina-portee* Emotional Distress Claim.

Although the courts must resolve all doubt concerning proof of those facts in favor of Mrs. Acuna as the non-moving party on a motion for summary judgment, it is illuminating to examine the defendant Turkish's contentions for his purpose of defending this case. On the first day of his depositions, Dr. Turkish stated that the unborn child of Mrs. Acuna was not a human being. See, Turkish Dep., P. 96 L.18 to 25, at Pa 138; P. 98 L.19 to 25, at Pa 176; P. 120 L.10 to 18, at Pa 183. Dr. Turkish claimed that an unborn child aged seven weeks was "just tissue". Turkish, P. 165 L.10 to 21, P. 166 L. 11 to 16, at Pa 163-164. Dr. Turkish claimed that an unborn child is not an existing human being until so-called viability, at 20 to 24 weeks post-conception. Turkish, P. 204 L.18 to P. 205 L.15, at Pa 179-180.

The absurdity of this contention is underscored by two aspects of his testimony. First, when asked, he admitted that he knew of no scientific or medical literature that supports his contention that the child is not a human being until "viability". Turkish Dep. P. 204 L.18 to P. 205 L.15, at Pa 179-180. Since he could not produce a single scientific or medical authority to support his factual contention, Dr. Turkish claimed that the conclusion about that issue is a matter for his personal philosophy or beliefs. His only basis for this view is his understanding of *Roe v. Wade*, 410 U.S. 113 (1973). Turkish, P.118 L. 4 to P. 121 L. 23, at Pa 181-182,

P. 204 L. 18 to P. 205 L. 15, at Pa 179-180. Thus, Dr. Turkish claims that when advising a woman about abortion he has the right to impose on the mother his own "philosophical" value system instead of informing the mother of the scientific and medical facts so she can make a determination for herself and her unborn child. It is clear that any medical doctor or scientist who denies that the unborn child is a "person" is not speaking of the biological and scientific question, but the personal value judgment that those doctors or scientists make concerning whether to accord to that human being the same moral value or legal rights accorded to other human beings. See, Saugstad, at Pa 445-446. See also, Certification of Professor Robert George, at Pa 447 to 468 (issue addressed at 466 to 468). See Turkish, P. 204 L. 18 to P. 205 L. 15, at Pa 179-180.[1]

Dr. Saugstad's distinction (and that of Prof. George) between the scientific factual question and the value or moral question is even acknowledged by Dr. Turkish himself. In the second day of his deposition, Dr. Turkish admitted that the life of a human being begins at conception.

This admission of Dr. Turkish is at odds with his statement to Mrs. Acuna in April, 1996 that her unborn child was nothing but "some blood" or "some tissue."

---

1. This conclusion, that it is universally accepted in the scientific community that the unborn child is a human being as a matter of fact (but those who deny that fact in every instance are speaking only to the value judgment) is the subject of the report of the Committee of the Judiciary of the United States Senate. See, Report of Subcommittee of Judiciary Committee of U.S. Senate on Human Life Bill, 1981.

However, his testimony given near the end of the second day of depositions explains the discrepancy. Where Dr. Turkish says the unborn child is not a human being at four to eight weeks post-conception, he is clearly speaking about his personal philosophical view that the life of that particular human being should not be afforded the same value and protections as other human beings. He is not speaking about the scientific and biological fact that there is a human being in existence at that time. This is clear from his testimony on P. 242 to 244 of his deposition, at Pa 495 to 497. When he was first asked if he agreed or disagreed that "life begins at the moment of conception - the time when a female reproductive cell, the ovum, is fertilized by a male reproductive cell, the spermatozoon", Dr. Turkish stated that statement is a subjective "philosophical thing". When he was told that the statement is made as a biological fact, he agreed with the statement as an accurate statement of biological fact. See, Turkish, P. 242, L. 16 to P. 244 L.8, at Pa 495 to 497.

When Mrs. Acuna learned a month or so later that on April 9, 1996 Dr. Turkish had terminated the life of a living human being, her existing unborn child, the result was a severe, deep and profound depression and emotional distress that threatens the basis of her stability. See, Certification of Psychologist Theresa Burke, at Pa 203 to 221.

REASONS FOR GRANTING THE PETITION

The Supreme Court of New Jersey misconstrued this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833 (1992). In doing so, the opinion of New Jersey's state court of last resort directly conflicts with the decision of the U.S. Court of Appeals for the Third Circuit in *Alexander v. Whitman*, 114 F.3d 1392, 1401 (3rd Cir. 1997). The Third Circuit, in construing *Roe*, held that the question of whether an unborn child is a human being was a question of fact for the trier of fact to determine. The Supreme Court of New Jersey disagreed, and, relying upon its mis-interpretation of *Roe*, took that fact issue away from the jury. The New Jersey Supreme Court concluded that *Roe* held that the judgment that the fetus or embryo is a human being (a member of the species *Homo sapiens*) is not a determination of fact, but rather a "moral, theological or philosophical judgment." *Acuna*, 930 A.2d at 425-26.

This error of the New Jersey Supreme Court resulted in depriving the Plaintiff of a trial on her claim.

This case also involves violations of equal protection and due process that are critical to many tens of thousands of women in New Jersey alone, about matters that directly implicate their fundamental liberty interests. These issues have never been decided by this Court, but are issues this Court should decide.

Portions of this Court's decision in *Roe v. Wade* continues to confuse and confound even the most sophisticated inferior courts such as the New Jersey

Supreme Court. Only this Court can eliminate this confusion and resolve the critical conflict between the decision of the U.S. Court of Appeals for the Third Circuit and the New Jersey Supreme Court.

INTRODUCTION: RELEVANT STATE AND FEDERAL LAW

A. The Relevant New Jersey Tort Law – Uninformed Consent Negligence

(1) General Principles of Informed Consent

The negligence of Dr. Turkish was his failure to obtain an informed consent. See, *Acuna v. Turkish*, 808 A.2d 149, 156-159 (N.J. 2002)(*Acuna I*); *Acuna v. Turkish, Acuna v. Turkish*, at 894 A.2d 1211-1212; 1214-1215 (*Acuna II*). Uninformed consent is a negligence concept predicated upon the duty of a doctor to disclose such information as will help the patient make an informed decision about her medical treatment. *Largey v. Rothman*, 540 A.2d 504, 505-508 (N.J. 1988). A fact must be disclosed if a reasonable patient in the plaintiff's position would likely attach significance to it in deciding to undergo or forego a procedure. *Largey*, at 504-505; 506-508; 510-512.

A doctor has a general duty of care to the unborn child to preserve the child's health and life at every age of gestation. *Giardina v. Bennett*, 545 A.2d 139, 142-3, 145 (N.J. 1988); *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). Thus, the physician who has a pregnant mother as a patient has two separate patients, the mother and her unborn child, and the doctor owes a duty to both.

Draper v. Jasionowski, 858 A.2d 1141, 1146-1148 (N.J. 2004); *Procanik v. Cillo*, 478 A.2d 755, 760 (N.J. 1984); *Giardina*, at 141-143, 145; *Hummel v. Reiss*, 608 A.2d 1341 (N.J. 1992); American College of Obstetricians & Gynecologists, *Ethics in Obstetrics and Gynecology*, 34 (2nd Ed. 2004); Harrison et al, *The Unborn Patient*, 2d Ed. W.B. Saunders, Phil. 1991. The doctor's duty to the child in utero encompasses a duty to disclose to the child the risk or impact of a procedure upon the unborn child. The doctor discharges that duty by making the disclosure about the impact on the child to the pregnant mother, who must make the decision for her child. *Draper v. Jasionowski*, 858 A.2d 1141, 1146-1148 (N.J. 2004).

(2) The Standard to be Applied When a Patient Asks for Information

Mrs. Acuna asked Dr. Turkish whether her "baby was already there." By baby she meant a "human being." The doctor had a duty to answer her inquiry truthfully and accurately, and all reasonable follow-up questions. *Howard v. Univ. Of Med. and Dent. of N.J.*, 800 A.2d 73 (N.J. 2002).

This additional standard of disclosure is important for three reasons. First, the patient puts the doctor on notice that *she* considered the answer material. Second, the standard reflects a policy which does not permit the doctor to deceive the mother. Finally, the standard of disclosure in a case which involves an abortion must reflect policy considerations unique to the mother's decision. She is, in fact, involved in determining whether or not to waive perhaps her most important liberty

interest, her constitutionally protected fundamental interest in her relationship with her child. *Santosky v. Kraemer*, 455 U.S. 745 (1982); *Lehr v. Robertson*, 463 U.S. 248, 256, 259-260; n16 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979). *Howard* held that a patient to whom a doctor gives a deceptive answer has an Uninformed Consent Negligence claim, if a false answer would affect the validity of the consent. *Howard*, at 82-83. Mrs. Acuna's question went directly to the nature of the procedure and the risk to, and impact on, the second patient for whom she was making a decision. Mrs. Acuna relied upon his misrepresentation. Acuna Dep., Pa.155 L.17 to 23; Pa.156 L.14-15; Burke, Pa.203-04; Pa.219-20.

(3) What Disclosures Should Be Made, and Whether the Physician's Statement In Answer to the Patient's Questions Are Truthful, Are Questions of Fact To Be Determined by a Jury, Not the Court

Under New Jersey law, what facts a reasonable patient would consider material; what disclosures may be accurate and adequate concerning those material facts; and whether the actual statements made by the physician, if any, are accurate, are questions of fact for a jury, not a question for a court. *Niemiera by Niemiera v. Schnieder*, 555 A.2d 1112, 1121 (N.J. 1989); *Caputo v. Antiles*, 686 A.2d 356, 361-362 (N.J. App. Div. 1996); *Largey v. Rothman*, 540 A.2d 504 (N.J. 1988).

It is irrelevant that Mrs. Acuna knew that if the process of pregnancy was uninterrupted, at the end of nine months a baby would be born, because she wanted to know exactly what was already in existence.

> Even if the patient is partially informed at the onset of the physician-patient relationship, it is the physician's duty to fill any informational gaps that preclude a meaningful exercise of the patient's self-determination right. *Geler v. Akawie*, 818 A.2d 402, 417 (N.J. App. Div. 2003).

The fact that the different alternatives available to Mrs. Acuna were mutually exclusive, make the need for the information about the unborn child, and what exactly is being "evacuated," more critical.

> The physician's duty to inform the patient of alternatives is especially important when the alternatives are mutually exclusive. If, as a practical matter, the choice of an alternative precludes the choice of others, or even if it increases appreciably the risks attendant on the alternatives, the patient's need for relevant information is critical. *That need intensifies when the choice turns not so much on purely medical considerations as on the choice of one life style or set of values over another.*

Matthies v. Mastromonaco, 733 A.2d 456, 463-464 (N.J. 1999). (Emphasis added).

B. Three Fundamental Liberty Interests of Mrs. Acuna Protected by the Due Process Clause of the Fourteenth Amendment are Implicated in this Case

When Mrs. Acuna was considering whether or not to consent to the abortion proposed by Dr. Turkish, her decision implicated three separate constitutionally protected liberty interests under the Fourteenth Amendment. The violations of Mrs. Acuna's Equal Protection and Due Process Rights, identified below, must be considered in that context.

A mother's interest in her relationship with her child is a constitutionally protected fundamental liberty interest. *Santoski v. Kramer*, 455 U.S. 745, 753 (1982). It is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court, having first been recognized through *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). See, *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This liberty interest has its source "in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

Since the interest protected is the interest in the relationship itself, the protection afforded by the Constitution depends upon the existence of the relationship. This is clearly demonstrated by the cases that have addressed when the rights of a biological father of a child born out of wedlock will be recognized and

when they will not. Compare *Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammed*, 441 U.S. 380, 389 n.7 (1979) (making the point explicitly) *with Quilloin v. Walcott*, 434 U.S. 246, 248 (1978); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

In contrast to the cases involving fathers, the mother's interest in her relationship with her child has always been protected as fundamental. This is because "the mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr*, *supra*, 463 U.S. at 260 & n.16 (quoting *Caban*, *supra*, 441 U.S. at 397 (dissent by Stewart, J.)).

The pregnant mother who submits to an abortion is terminating her existing relationship with her child. That means she is deciding whether to waive, give up and terminate her fundamental constitutionally protected interest. She cannot possibly make an informed decision of whether to waive her fundamental right unless she clearly understands that her child already exists.

Also implicated in Mrs. Acuna's decision was her constitutionally protected interest in making decisions relating to the welfare of her child. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000). Since the procedure would terminate the life of her existing offspring, for whom Mrs. Acuna was making a decision, and whose welfare she was deciding, a clear, unequivocal statement about the existence of her child and the precise impact on her child is necessary.

Third, Mrs. Acuna has a constitutionally protected interest in her own health. *Cruzan by Cruzan v. Director, MO. Dept. of Health*, 497 U.S. 261, 278 (1990); *Winston v. Lee*, 470 U.S. 753, 758-759 (1985); *Doe v. Bolton*, 410 U.S. 179 (1973). As occurred in this case, failure to disclose the impact of the procedure on the "fetus" can have devastating psychological consequences for the mother when she later learns the truth that she was implicated in terminating the life of her own child without being properly informed. See, *Planned Parenthood v. Casey*, 505 U.S. at 850-852.

I. There Is a Conflict Between the Decisions of the U.S. Court of Appeals for the Third Circuit and the New Jersey Supreme Court Concerning the Interpretation of this Court's Decision in *Roe V. Wade*. The Issue Implicates the Fundamental Rights of Millions of Women. This Court Should Resolve this Conflict.

In *Alexander v. Whitman*, 114 F.3d 1392 (3rd Cir. 1997), the U.S. Court of Appeals for the Third Circuit, in construing *Roe v. Wade*, 410 U.S. 113 (1973), and applying that holding and principles enumerated therein, held that the question of whether or not a fetus or embryo is a human being, in the scientific sense, was a question of fact to be determined by a fact finder. In determining, or reaffirming that a fetus does not enjoy constitutional rights, the Third Circuit distinguished between the purely biological question of whether the fetus was, in fact, a human being; and the legal question of whether that human being possesses constitutional rights.

> Of course, as noted above, our inquiry must accept all well pleaded facts as true and we note that the complaint avers that the stillborn child was a human being from the moment of conception . . . However, even if that is established as a matter of fact, we must look to controlling law to determine what effect, if any, that fact has upon our analysis.

Alexander, at 1401.

Thus, the Third Circuit understood that the statement of the *Roe* Court that it could not say when "life begins," was not speaking to the purely scientific question of whether the embryo or fetus was an entire human being, a member of the species *Homo sapiens*. Rather, the Supreme Court spoke of the question whether the unborn were human beings who enjoyed constitutional rights.

It is clear that the Third Circuit understood the questions to be distinct and that *Roe v. Wade* did not hold or suggest that whether the fetus or embryo was a human being was anything other than a question of fact. The Third Circuit made it clear that the question of fact of whether an embryo or fetus is a human being, as a matter of biological fact, is different from the question of whether some human beings, in fact, may not possess constitutional rights. This is so evident that Judge Alito felt compelled to comment on the distinction as one that – although accurate in the context of the embryo or fetus – could be misused in other contexts.

> First, I think that the court's suggestion that there could be 'human beings' who are not 'constitutional persons' (Maj.Op. 1401-02) is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a 'person' within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.

Alito, J., Concurring Opinion at 1409.

In this case, Princeton University Professor Robert P. George, J.D., D.Phil., submitted expert affidavits and reports on behalf of Mrs. Acuna.

> It is important to distinguish three questions. The first is scientific: Is the embryo or fetus a living member of the species homo sapiens who, as a distinct, self-integrating organism, directs its own development from conception through the embryonic, fetal, and infant stages of its development into childhood, adolescence and, finally, adulthood? The second question is in the moral domain: Do living human beings have worth, dignity, and fundamental rights at every point in their development, or only after they have attained a certain stage of development? The third question is legal: Do the Constitution and .aws of the United States and the several states protect the rights of embryonic and fetal human beings?

> In *Roe v. Wade*, the Supreme Court declined to opine on the scientific and moral questions . . . What is crystal clear, though, is that the Court expressly declined to say "at this point in the development of man's knowledge" that a human embryo or fetus is *or is not* a living human being."

The Appellate Division, in this case, understood the *Alexander* Court's decision to clearly recognize that the fact that whether the "unborn" are human beings, is a question of fact, but that legal definitions of "person" control the legal rights of such human beings.

> The Court added that the fact that Plaintiff's pleadings and expected proofs support the conclusion that a fetus was a 'human being' did not alter the legally established definition of 'persons' under the Fourteenth Amendment.

(Citation omitted). *Acuna I*, 808 A.2d at 153.

The New Jersey Supreme Court reached the entirely opposite conclusion of the Third Circuit in *Alexander*. The New Jersey Supreme Court held that whether the embryo or fetus is a human being in the biological sense, a member of the species *Homo sapiens*, was not a question of fact for a jury. Rather, that Court held that the conclusion of Plaintiff's experts was nothing other than a "moral, theological or ideological judgment." See, *Acuna*, 930 A.2d at 425-428.

In treating the Experts conclusion of fact as some kind of "ideological statement," the New Jersey Supreme Court relied heavily upon this Court's decisions in *Roe*, and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The New Jersey court relied upon *Roe's* statement that it could not answer the "difficult question of when life begins" because "when those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Acuna*, at 426. The New Jersey Court then recites that it carefully reviewed this Court's opinion in *Planned Parenthood v. Casey*, and found that this Court "scrupulously avoids describing either a fetus or an embryo as an existing human being." *Acuna*, at 426.

The New Jersey Supreme Court was speaking about the question of "when life begins" that was addressed by *Roe*, when, in fact, the Plaintiff only sought a trial in which the scientific facts were relevant, not the culture's value judgment.

The point that Mrs. Acuna makes is that the judgment of whether or not the life of this particular human being had value, was a personal judgment only she could make under existing law. It was only her values that matter, not Dr. Turkish's. Once she knew the scientific facts, and only then, she could apply her own values in order to make a decision for herself and for her child. She could not make that judgment for herself without her understanding that that human being was already in existence. To her, in applying her own values, there was a vast difference between preventing a human being from coming into existence, and terminating the life of an existing human being.

In the end, the New Jersey Supreme Court thought it was being called upon to "decide the difficult issue" of "when life begins."

> On the profound issue of when life begins, this Court cannot drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arranged along deep societal and philosophical divide. We are not unmindful of the raging debate that has roiled our nation and of the sincerely and passionately held belief by those on opposite sides of the debate . . . However, the common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion only with material medical information, including gestational stage . . . the knowledge that Plaintiff sought from the Defendant who may have a different scientific, moral or philosophical viewpoint on the issue of when life begins.

Acuna, at 427, 28.

The Court simply called a fact question a question of "ideology." The irony, of course, is that *Roe* and *Casey* were supposed to protect a "right to choose" for Mrs. Acuna, but instead, New Jersey's interpretation of *Roe* and *Casey* denied her an informed choice. Thus, *Roe* and *Casey* were used as a shield for the doctor who, through negligence and deception, terminated the rights and interests of Mrs. Acuna.

II. Denying Plaintiff a Trial Violated her Right to Due Process.

Under New Jersey law, the question of what information is material to the reasonable patient for her to make an informed decision for herself, and a decision for her unborn child was a question of fact for the jury. See, discussion of New Jersey Law, *supra*. Under New Jersey law if there was a dispute as to material facts, a Motion for Summary Judgment must be denied and the disputed facts must be submitted to a jury. *Brill v. Guardian Life Ins. of Amer.*, 666 A.2d 146 (N.J. 1995).

Mrs. Acuna's cause of action against Dr. Turkish "is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There is no doubt that a state created tort claim is a "property" protected by the Due Process Clause. *Mullane*, at 313; *Martinez v. California*, 444 U.S. 277, 281-82 (1980).

The hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." *Bell v. Barson*, 402 U.S. 535, 541 (1971). See, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has held:

> It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard.

Bell, at 542.

Here, Plaintiff was denied a trial. Without a fact finding hearing the central issue could not be decided appropriately. Denial of a trial on an issue of fact under the circumstances of this case, is a clear deprivation of Mrs. Acuna's due process rights, only a trial could resolve the central issues.

The due process violation is not abrogated by the unsubstantiated assertion of the Supreme Court that the issue is not a question of fact. Mischaracterizing the issue in a way designed to deny a trial cannot obscure the fact that the court either determined the question of fact itself, without taking proofs; or it denied a trial by calling a question of fact a mysterious question of "philosophy" or "ideology." Nor can the Court deny due process by claiming it is merely deciding what disclosures are required by its common law. Its common law clearly reserves that question for a jury, only after a trial. It is not the function of the Court in New Jersey to "fashion" disclosures. This Court has previously rejected the asserted reasons of state courts that deny trials based upon so-called state common law when the asserted reasons for denial are transparent and irrational. Thus, asserted "problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

Due process precludes the State from denying Plaintiff "established adjudicatory procedure, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right(s).'" Logan, at 429 (quoting, *Boddie v. Connecticut*, 401 U.S. 371 (1971).) For ten years Plaintiff relied upon New Jersey to give her a trial to resolve factual disputes.

The New Jersey Court's reasoning in denying Plaintiff a trial is so blatantly erroneous, one might wrongly imply bad faith. For instance, the New Jersey Supreme Court acknowledged that "Plaintiff is prepared to present expert testimony to establish, as a biological fact, that her embryo was 'an existing human being' – 'a member of the species *Homo sapiens*' – at the time of the abortion." *Acuna*, 930 A.2d at 425. What the Court did not do, was analyze the impeccable and irrefutable scientific evidence provided by Plaintiff's nationally and internationally renowned experts from the fields of molecular biology, fetal surgery, human genetics, human embryology, obstetrics, neonatology (Pba10-13) which will show that the fact an embryo and fetus implanted in a woman's womb is an entire member of the species *Homo sapiens* is scientifically verifiable.[2] Instead, the New Jersey Court said that "the Defendants, however, can present expert witnesses who will dispute the point and *who will assert* that Plaintiff's characterization of the embryo as a living human being, is a moral, theological or ideological judgment, not a scientific or biological one." *Acuna*, at 425-426. (Emphasis added).

The Defendants' experts assert that Plaintiff's detailed scientific facts and analysis was merely a moral,

---

2. The various reports and certifications of Plaintiff's experts are found in the Appendix (Dr. Mark, molecular biologist, at Pa 222-258; Pa661-663; Pa934-35; Dr. Carlson, human embryologist at Pa281-320; Pa812-867; Dr. Langer, fetal surgeon, at Pa321-360; Dr. DeVeber, Neurologist, Pa361-392; Dr. Saugstad, neonatologist, Pa400-447; Pa503-509; Pa936-939; Dr. Peeters-Ney, Geneticist, Pa259-280; Pa664-675; Dr. Nathanson, obstetrician, Pa469-482; Pa906-908).

theological or ideological judgment. In fact, the Defendants produced no scientific proofs of any kind that contradicted the Plaintiffs' substantial scientific evidence. Their "assertion" was merely that. Rather, they offered the philosophical musings of an obstetrician, Dr. Joseph Ramieri. Dr. Ramieri testified that he knew of no scientific literature to support his contention that the unborn child was not a human being as a matter of biological fact. Rather, he said his was a personal opinion only, based upon *Roe v. Wade*. He stated that because *Roe v. Wade* made it legal to "kill" the unborn child, that must mean it is not a human being. He also stated that if the Supreme Court of the United States reversed *Roe*, and an abortion was made illegal, that would mean that it is a human being. See, Professor Robert George's critique of Dr. Ramieri's testimony at Pa717-720.

Likewise, Defendants' other expert, Dr. Lee Silver spoke only of his personal philosophy and has recanted his opinion he gave in the *Acuna* case as being "wrong" and "illogical." Dr. Silver originally expressed the view that a human organism is not a "human being" until the organism has "sentience." He admits that there is no scientific text or body of literature that supports this personal philosophical view. In a deposition in *Planned Parenthood v. Rounds*, 467 F.3d 716 (8th Circuit 2006) vacated by Order of *en banc* panel dated January 9, 2007, he admitted that the philosophical view he expressed in *Acuna v. Turkish* was "wrong." He has recanted his opinion in the *Acuna* case as "illogical," and that his opinion is in a state of "evolution." See, Addendum B, to Plaintiff's Supreme Court Brief, portions of deposition of Dr. Lee Silver, P.38, L.11 to P.39, (his opinion in *Acuna* was "wrong"); P.33 to P.38

(Dr. Silver's "thinking" is in a state of "evolution" and his ideas about sentient life are semantical notions and subjective); P.107 to 108 (Dr. Silver states that he is "not sure how to define any word"); P.186 to 188 (his opinion in *Acuna* is "illogical" and he discarded his view expressed in *Acuna* by May of 2005). Dr. Silver demonstrated how he confuses scientific facts and philosophical ideas and mix the two. See, Addendum B, dep.P.228. In this case, plaintiffs' expert, Professor Robert George, explained why Dr. Silver's opinion was nothing but his personal philosophy and why, as philosophy, it was totally illogical. See, report of Dr. George at Pa693 to 720 (C.V. Pa721 to 740).

Neither the opinions of Dr. Ramieri or Dr. Silver could be admitted in evidence. It is irrational for the New Jersey Court could cite to their opinions as such conclusive proof that Plaintiff's expert testimony cannot go to a jury.

The Court applied its principles of summary judgment in exactly the opposite required. The only time the court holds a trial is precisely because there is disagreement. Denying the Plaintiff a trial on the "assertions" of Dr. Ramieri and Dr. Silver is a violation of due process.

The New Jersey Court also stated "Plaintiff cannot find support for creating the legal duty she seeks to impose in either this state's law or federal law." *Acuna*, at 426. The Court is actually incorrect on both counts. The Court cites to the Wrongful Death Statue as construed by *Giardina v. Bennett*, 545 A.2d 139, 143-44, 147 (N.J. 1988) (which does not recognize recovery

for death in utero), and that the legislature has not made killing a fetus or embryo in utero a "homicide."

If, as the New Jersey Court states, the fact the New Jersey Wrongful Death Statute does not provide a claim for death in utero, shows that the unborn child is *not* a *human being* – which it does not – the fact that forty (40) states do provide claims for Wrongful Death, and thirty-two (32) states and the federal government have Criminal Homicide Statutes for killing the unborn child would constitute evidence that the unborn child is a human being. See, Addenda I and II attached to Plaintiff's App. Div. Brief

Actually, many states have found that the embryo and fetus are human beings as a matter of scientific fact. For instance, the Supreme Court of West Virginia expressly states: "A child en *ventre sa mere* is not only regarded as a human being, but as such from the moment of conception – which it is in fact." *Farly v. Sarten*, 466 SE 2d 522, 527 (1995). The State of Illinois has found that the embryo is a human being: "The state of gestation or development of a human being when an injury is caused, . . . or at death, shall nor foreclose . . . (a) cause of action . . . arising from the death of a human being . . ." *Seef v. Sutkus*, 58 NE 2d 510, 512, (Ill 1991) (citing to Illinois Wrongful Death Statute). Mrs. Acuna's unborn child cannot be a human being in fact while she drives through Illinois, but is not a human being in fact in New Jersey just because New Jersey doesn't recognize a cause of action for wrongful death.

It is puzzling that the New Jersey Court references the *Giardina* case at all to make this point because

Giardina recognizes the fact that the death of an unborn child is a death of a family member for purpose of the *Giardina-Portee* claim. Thus, *Giardina*, by the Court's reasoning, could just as easily be cited to support the fact that the fetus or embryo is a human being. New Jersey's denial of a trial is irrational.

III. New Jersey's Decision That the Physician Did Not Have to Disclose the Impact of the Procedure upon Mrs. Acuna's Unborn Child, and the Court's Failure to Impose the *Howard* Standard to Her Case, Each Violated Mrs. Acuna's Equal Protection Rights.

Dr. Turkish had a duty to inform Mrs. Acuna of the impact the procedure would have on the second patient, the unborn child. *Draper v. Jasionowski*, 858 A.2d 1141, 1146-48 (N.J. 2004). By proposing that Mrs. Acuna have an abortion, Dr. Turkish proposed that she consent to the termination of the life of his second patient to whom he owed a legal and professional duty. His legal authority to terminate the life of his second patient was the consent he took without Mrs. Acuna ever knowing that there was a human being (in the biological sense) whose life would be terminated. Dr. Turkish made the affirmative misrepresentations that the second patient didn't even exist. Denying a disclosure about the impact on the second patient to Mrs. Acuna, and other mothers similarly situated, while requiring such disclosures in all other instances, is a violation of Mrs. Acuna's equal protection rights. See, generally, *Plyer v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Ryster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Griffin v. Illinois*, 351 U.S. 12 (1956); Tussman and ten Broek, *The Equal Protection*

of the Laws, 37 Cal. L. Rev. 341 (1949). Denying protection of the Informed Consent Laws to the classification of pregnant mothers considering an abortion, does not advance any legitimate state interest and the fact that the decision the mother is making is whether or not to terminate a constitutionally protected interest requires strict scrutiny of that classification. See, generally, *Weber v. Aetna*, 406 U.S. 164, 175 (1922); *Clark v. Jeter*, 486 U.S. 456, 451 (1988).

Likewise, the New Jersey Supreme Court did not apply the standard of *Howard v. Univ. of Med. and Dent. of N.J.*, 800 A.2d 73 (N.J. 2002), when a patient asks a specific question. The issue in such a circumstance is whether the doctor's answer was truthful and accurate. There is no state interest that justifies treating Mrs. Acuna differently than any other patient. In fact, her circumstances, involving as they did, a decision of whether or not to give up or terminate her fundamental liberty interest in her relationship with her child, required the greatest of all scrutiny and protection.

CONCLUSION

The United States Supreme Court should grant a writ of certiorari and review these important constitutional questions of broad application.

Respectfully submitted,

HAROLD J. CASSIDY
HAROLD J. CASSIDY & ASSOCIATES
Attorneys for Petitioner
750 Broad Street
Suite 3
Shrewsbury, NJ 07702
(732) 747-3999

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED SEPTEMBER 12, 2007

SUPREME COURT OF NEW JERSEY
A-15 September Term 2006

ROSA ACUNA Administratrix ad Prosequendum of the Estate of ANDRES ACUNA, deceased infant of ROSA ACUNA, General Administratrix of the Estate of ANDRES ACUNA, deceased infant of ROSA ACUNA, and Rosa Acuna individually,

Plaintiff-Respondent,

v.

SHELDON C. TURKISH, M.D., and OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, a Partnership of P.C. organized under the laws of the State of New Jersey,

Defendants-Appellants,

and

JANET JONES, R.N. (A fictitious name of a real individual),

Defendant.

Argued February 20, 2007
Decided September 12, 2007

Appendix A

JUSTICE ALBIN delivered the opinion of the Court.

Plaintiff Rosa Acuna filed a malpractice action against Dr. Sheldon Turkish, her obstetrician-gynecologist, claiming that she did not give him informed consent to perform a procedure terminating her pregnancy. In her complaint, plaintiff specifically alleges that Dr. Turkish breached a duty owed to her by failing to inform her of "the scientific and medical fact that [her six- to eight-week-old embryo] was a complete, separate, unique and irreplaceable human being" and that an abortion would result in "killing an existing human being." Plaintiff contends that every physician, before performing an abortion, must advise the patient in clear and understandable language that "the family member [the embryo] is already in existence and that the procedure-indeed the central purpose of the procedure-is intended to kill that family member."

Although a physician unquestionably has a common law duty to provide a woman with material information concerning the medical risks of a procedure terminating a pregnancy, we know of no common law duty requiring a physician to instruct the woman that the embryo is an "existing human being," and suggesting that an abortion is tantamount to murder. There is not even remotely a consensus among New Jersey's medical community or citizenry that plaintiff's assertions are medical facts, as opposed to firmly held moral, philosophical, and religious beliefs, to support the establishment of the duty she would impose on all physicians. Because the duty that

plaintiff claims defendant breached did not exist at the time of their physician-patient relationship and because there is no basis for this Court to create a new duty that has no broad support in either the medical community or society, we reverse the Appellate Division and reinstate the trial court's dismissal of plaintiff's lawsuit.

I.

A.

On April 6, 1996, plaintiff Rosa Acuna, then age twenty-nine, consulted with defendant Dr. Sheldon Turkish, complaining of abdominal pains and headaches.[1] After examining plaintiff and conducting an ultrasound, defendant told plaintiff that she was pregnant. The ultrasound revealed that plaintiff was in her sixth to eighth week of pregnancy.[2] Plaintiff was married and the mother of two daughters under the age of three, and had suffered a miscarriage in her first pregnancy. Defendant, a practicing physician for more than thirty years, had been her regular gynecologist for five years and had delivered her youngest child.

---

1. The statement of facts is based on the summary judgment record in the trial court. At the summary judgment stage, we view the facts in the light most favorable to the non-moving party, plaintiff. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540, 666 *A.*2d 146 (1995).

2. Plaintiff's last menstrual period was February 21, 1996. By that calculation, the embryo was no more than seven weeks old.

Appendix A

Beginning in high school, plaintiff had suffered from renal glycosuria, a kidney disorder. According to plaintiff, defendant advised her that due to complications with her kidneys, unless she had an abortion she would have only three months to live. Defendant denied making that statement or ever having an experience in which he was required to encourage a woman to terminate a pregnancy to preserve her health. Indeed, defendant claimed that plaintiff introduced the subject of abortion as an option.[3]

Plaintiff said that she asked defendant "if it was the baby in there" and that defendant replied, "don't be stupid, it's only blood." Defendant could not recall how he responded but believes he likely would have told her that a "seven-week pregnancy is not a living human being," but rather it "is just tissue at this time."

Plaintiff admitted in a deposition that she obviously knew she was pregnant, but that she "just needed to know and [she] wanted to know if the baby was-if there was a baby already in [her]." When asked what she meant by baby, plaintiff stated, "[a] human being." In a certification, plaintiff explained that "[a]t the start of a pregnancy, [she] knew that at some future date a human being would come into existence." She understood that without some intervening circumstance or medical

---

3. Defendant's assistant, Brenda Salerno, vaguely remembered that plaintiff expressed that "she wanted to end the pregnancy because she ha[d] two small children at home" and that her pregnancy was "too soon after the birth of her second child."

procedure, a child would be born, but what she needed to hear on the day of her visit to defendant's office was that she was carrying then "an existing living human being."

After consulting with her husband, plaintiff returned to defendant's office three days later and signed a form giving her consent to perform a "TOP" (termination of pregnancy). On the form, plaintiff acknowledged that defendant "explained all of the risks and complications to [her]." That same day, defendant performed a vacuum aspiration, which ended the pregnancy.[4]

In the weeks afterwards, plaintiff experienced vaginal bleeding, and on May 4 was admitted into Robert Wood Johnson Hospital where she was diagnosed with an "incomplete abortion." A dilatation and curettage was performed. After the procedure, plaintiff asked a nurse "what had happened." The nurse replied "that the doctor had left parts of the baby inside of you."[5] At that point, plaintiff "started to realize that [there] was a baby and not just blood" inside of her.

After her release from the hospital, plaintiff began to do research on "early pregnancies and babies in their

---

4. A vacuum aspiration is a procedure "in which the physician vacuums out the embryonic tissue." *Gonzales v. Carhart*, 550 *U.S.* __, 127 *S.Ct.* 1610, 1620, 167 *L.Ed.*2d 480, 495 (2007).

5. The pathology report indicated that the dilatation and curettage procedure yielded only chorionic villi, the lining of the uterus, and not fetal parts.

mother's womb," looking for answers and trying to reconcile the nurse's remarks with defendant's characterization of her pregnancy. Eventually, she concluded that the abortion procedure killed "a human being." That realization was followed by a decline in her mental health and a later diagnosis of post-traumatic stress disorder.

B.

Plaintiff, individually and as administratrix of the estate of her "deceased infant," Andres Acuna, filed an eleven-count malpractice complaint in the Law Division, Middlesex County, naming as defendants Dr. Turkish, his medical group (Obstetrical and Gynecological Group of Perth Amboy-Edison), and a nurse not then identified, but fictitiously named as Janet Jones, R.N.[6] Plaintiff asserted wrongful death and survival claims on Andres' behalf and negligent infliction of emotional distress, negligence, and lack-of-informed-consent claims on her own behalf.[7]

Plaintiff's lawsuit primarily focused on the theory of lack of informed consent. The complaint alleged that defendant failed to inform plaintiff that (1) "[Andres] Acuna, although a person unborn, was a complete,

---

6. Here, we refer to the "third amended medical malpractice complaint and jury demand" filed on July 28, 2003. The original complaint was filed on April 8, 1998.

7. The counts relating to the nurse were later dismissed by plaintiff.

separate, unique and irreplaceable human being"; (2) there existed the potential risk that Andres "was capable of experiencing pain" at eight weeks gestation; (3) abortion involved "actually killing an existing human being"; (4) she would be at risk of suffering from "post-abortion syndrome," a form of a post-traumatic stress disorder; and (5) she would come to realize that she "was responsible for killing her own child" and bear a weight of guilt for the rest of her life. Plaintiff further alleged that had defendant provided her with the necessary "scientific, medical and factual information surrounding the nature of abortion and the fact that [Andres] Acuna was a complete, separate and unique human being she would not have had the abortion procedure."

The Honorable Douglas T. Hague, J.S.C., granted defendant's motion for partial summary judgment on the wrongful death, survival, and emotional distress causes of action. Judge Hague held that a six- to eight-week-old "fetus" is a not a "person" under the Fourteenth Amendment, (citing *Roe v. Wade*, 410 *U.S.* 113, 93 *S.Ct.* 705, 35 *L.Ed.*2d 147 (1973)), or under the laws of this State for purposes of maintaining claims for wrongful death, survival, or negligent infliction of emotional distress, (citing *Giardina v. Bennett*, 111 *N.J.* 412, 545 *A.*2d 139 (1988)). Plaintiff's negligence claim based on a theory of lack of informed consent was not implicated in that summary judgment motion.

The Appellate Division granted plaintiff's motion for leave to appeal and affirmed the dismissal of the wrongful death claim, but reversed the dismissal of the

emotional distress claim. *Acuna v. Turkish*, 354 *N.J.Super.* 500, 505, 808 *A.*2d 149 (App.Div.2002) (*Acuna I*). In upholding the dismissal of the wrongful death claim, the panel first found that no fundamental right was "implicated by *Giardina's* holding that the Wrongful Death Act does not permit recovery attributable to the wrongful death of a fetus." *Id.* at 511, 808 *A.*2d 149. The panel rejected plaintiff's contention that the Federal Constitution's equal protection guarantee is violated by allowing recovery for the wrongful death of a child who dies after birth from a tortious injury suffered in utero, but yet no recovery for a fetus that dies in the mother's body from the same tortious injury. *Id.* at 508, 513, 808 *A.*2d 149. Adopting the reasoning of *Alexander v. Whitman*, 114 *F.*3d 1392, 1400 (3d Cir.), *cert. denied*, 522 *U.S.* 949, 118 *S.Ct.* 367, 139 *L.Ed.*2d 286 (1997), which rejected a similar argument, the panel stated: " '[a] mother's relationship *408 with her fetus is exactly the same whether or not she can bring a wrongful death or survivor action. It is not the relationship that is affected here, it is the ability to recover for the loss of that relationship.' " *Acuna I*, *supra*, 354 *N.J.Super.* at 511, 808 *A.*2d 149 (alteration in original) (quoting *Alexander*, *supra*, 114 *F.*3d at 1404).

Next, the panel explained "that the trial court erred in dismissing [plaintiff's] emotional distress claim on the basis that a fetus is not a 'constitutional person.' " *Id.* at 515, 808 *A.*2d 149. That was so because the alleged malpractice-the failure to obtain informed consent-was not a derivative claim but committed directly against plaintiff. *Ibid.* The panel recognized that a mother who

was not advised by her physician of material information before terminating an eight-week-old pregnancy might suffer severe distress and mental anguish. *Id.* at 518, 808 *A.*2d 149. The panel was guided by *Giardina, supra,* 111 *N.J.* at 420, 545 *A.*2d 139, which held that parents whose infant was delivered stillborn due to medical malpractice could recover damages under a theory of negligent infliction of emotional distress. *Acuna I, supra,* 354 *N.J.Super.* at 516-17, 808 *A.*2d 149. The panel concluded that the present case could not be logically distinguished from *Giardina* solely because the fetus did not survive to term.[8] *Id.* at 517, 808 *A* 2d 149. The panel also considered the emotional distress claim "as a logical complement to the 'wrongful birth' cases, . . . which focus on 'the parents' lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects.' " *Id.* at 518, 808 *A.*2d 149 (quoting *Canesi v. Wilson,* 158 *N.J.* 490, 501-02, 730 *A.*2d 805 (1999)). Accordingly, the emotional distress cause of action was reinstated. *Ibid.*

Although the *Acuna I* court assumed that a physician owes a duty of care to disclose to a pregnant woman "information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy," notably, it did not address "the fact-sensitive issues concerning what dangers incident to, or

8. *Portee v. Jaffee,* 84 *N.J.* 88, 101, 417 *A.*2d 521 (1980), held that an emotional distress claim cannot proceed unless the plaintiff has a marital, familial, or intimate relationship with the "injured person."

consequences resulting from, such [an abortion] procedure would be 'material' to the 'prudent patient.' " *Id.* at 514, 808 *A.*2d 149. The parties agreed that the resolution of those issues needed to "await a complete factual record." *Ibid.*

C.

On remand, based on her review of the complete record, the Honorable Amy P. Chambers, P.J. Cv., granted defendant's motion for summary judgment on plaintiff's remaining claims. Judge Chambers observed that although the Appellate Division ruled that a woman could maintain an emotional distress claim against a physician who does not obtain informed consent before terminating a pregnancy, it did not decide whether plaintiff had presented facts to support her claim that defendant withheld from her material information that a reasonably prudent woman would need to know before consenting to an abortion. In the summary judgment motion, Judge Chambers had to address the assertion cast by plaintiff in her complaint — that, as a matter of law, defendant had a duty to inform plaintiff that her embryo "was a complete, separate, unique and irreplaceable human being" and that an abortion resulted in "killing an existing human being."

Judge Chambers noted that the issue raised did not concern "the information a physician should provide a woman about the stage of her pregnancy or the embryonic and fetal development process" or the situation of a woman "carrying a viable fetus." As Judge

Chambers pointed out, plaintiff understood that she was pregnant and that "she had growing within her the beginnings of a unique human life that would result in a birth of the living child if the pregnancy continued without complications or intervention," but that she wanted to be told before agreeing to terminate her pregnancy "that a unique living human being was already in existence within her."

By demanding that a physician advise a pregnant woman that her non-viable embryo "is in all material respects equivalent to a person born and alive," plaintiff would require that the doctor convey "a value judgment not a medical fact," according to Judge Chambers. She noted that the questions of when life begins and whether a woman should terminate a pregnancy "involve moral, philosophical, and religious questions." She further considered that " 'those trained in the respective disciplines of medicine, philosophy, and theology' " have failed to reach a consensus about when life begins, (quoting *Roe, supra*, 410 *U.S.* at 159, 93 *S.Ct.* at 730, 35 *L.Ed.*2d at 181), or " 'about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage,' " (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 *U.S.* 833, 850, 112 *S.Ct.* 2791, 2806, 120 *L.Ed.*2d 674, 697 (1992)). The law has left the question of whether to abort or go to term with a non-viable embryo, Judge Chambers continued, "for each woman to decide for herself." Judge Chambers concluded that in view of the "current state of the law and the lack of consensus" on the beginning-of-life question-a question implicating more than medical information-a

physician is not required to advise a woman that her non-viable embryo "is a living human being" to obtain her informed consent for an abortion. Thus, plaintiff's lack-of-informed consent and emotional distress claims were dismissed.

D.

In *Acuna v. Turkish*, 384 *N.J.Super.* 395, 403-07, 894 *A.*2d 1208 (App.Div.2006) (*Acuna II*), the Appellate Division addressed plaintiff's separate appeals challenging the earlier dismissal of the wrongful death claim and the dismissal of her informed consent and emotional distress claims. The panel declined to reconsider its dismissal of the wrongful death claim in *Acuna I*, but determined that the motion judge should not have granted summary judgment on the informed consent and emotional distress claims. *Id.* at 406-07, 894 *A.*2d 1208. The panel did not express agreement with plaintiff's assertion that a physician must disclose to a "pregnant mother that her unborn child is in existence *before* she can make an informed decision on whether" to undergo a termination-of-pregnancy procedure. *Id.* at 403-04, 894 *A.*2d 1208 (internal quotation marks omitted). Nevertheless, the panel found that a jury issue remained concerning whether defendant accurately answered plaintiff's question, "[I]s the baby already there?" *Id.* at 404, 894 *A.*2d 1208 (alteration in original). The panel perceived the sole issue in dispute to be "quite narrow, i.e., what medical information is material and must be disclosed by an obstetrician when advising a patient to terminate a pregnancy and what medical

information is material when the patient asks if the 'baby' is already 'there?' " *Id.* at 406, 894 *A.*2d 1208. It concluded "that summary judgment was inappropriate because a reasonable patient" might not consider the information defendant imparted to plaintiff to be "the information necessary to make an informed decision." *Ibid.* On that basis, the panel remanded the issue for trial, allowing both sides to present expert testimony to aid the jury. *Id.* at 406-07, 894 *A.*2d 1208.

We granted defendant's petition for certification seeking review of the Appellate Division's decision reinstating plaintiff's claims related to lack of informed consent, 188 *N.J.* 217, 902 *A.*2d 1234 (2006), but dismissed plaintiff's appeal as of right challenging the dismissal of her wrongful death and survival claims, 189 *N.J.* 420, 915 *A.*2d 1045 (2007). We granted the motions of the American Civil Liberties Union, the American Civil Liberties Union of New Jersey, and the New Jersey Obstetric and Gynecology Society to participate as *amici curiae* in support of defendant's petition.

II.

A.

The issue before this Court, as framed by plaintiff in her complaint and throughout the litigation, is whether defendant failed to provide her with material medical information concerning the nature of the six- to eight-week-old embryo she was carrying and the consequences

of her terminating her pregnancy.[9] Plaintiff specifically contends that defendant had a duty "to explain that the procedure [would] terminate the life of a living member of the species Homo sapiens, that is a human being." Plaintiff contends that "there is a critical difference between agreeing to a procedure that would *prevent a human being from coming into existence*, and agreeing to a procedure that *terminates the life of an existing living human being.*" (Emphasis added). She states that she will prove through expert testimony that her six-to eight-week-old embryo was an existing human being. In short, plaintiff submits that defendant was required to tell her that by consenting to an abortion she, in effect, was agreeing to "kill a child of [hers] already in existence."

It is equally important to note what is not at issue. Despite defendant's "don't-be-stupid-it's-only-blood" remark in describing the developmental stage of her embryo, plaintiff understood that without medical intervention or some other superseding circumstance, such as a miscarriage, she would give birth to a child in seven more months. That is, plaintiff did not take defendant's comment to mean that her pregnancy was compromised. Plaintiff, moreover, does not claim that defendant's alleged expression concerning the dangers to her health if she went to term affected her decision to

---

9. The embryonic stage covers the gestation period from conception to about eight weeks. The fetal stage covers the period from about eight weeks to birth. *Magill's Medical Guide* 9 (Tracy Irons-Georges ed., 2d rev. ed.2002).

end her pregnancy.[10] As she has repeatedly said, to make an informed decision whether to terminate her pregnancy, she needed to know that her embryo was even at that point an existing human being.

Defendant and *amici* argue that it would be bad public policy, and probably unconstitutional, under the banner of the law of informed consent, to compel obstetricians to voice plaintiff's non-medical and ideologically-driven viewpoint in the ongoing debate on abortion. They maintain that whether a six- to eight-week-old embryo is an "existing human being" is not a biological fact, but a moral, theological, and highly personal judgment that has sharply divided society, and therefore it would be inappropriate to impose a duty on doctors to take sides in this highly charged debate. Defendant and *amici* also submit that requiring physicians to instruct women seeking an abortion that they will be killing their babies if they go through with terminating their pregnancy places an unconstitutional burden on a woman's right of self-determination. Additionally, they claim that mandating that a physician express a non-medical and value-laden viewpoint conflicting with the physician's own strongly held personal and moral beliefs violates his First Amendment right to the exercise of free — not coerced — speech.

---

10. Plaintiff averred in a supplemental brief submitted to this Court after oral argument that "if she knew that her baby was already there, she would have more carefully scrutinized the information about her health risks, would have sought a second opinion, would have learned that her life was *not* in danger, and would not have consented to the vacuum aspiration."

Appendix A

B.

Ultimately, we must decide whether, under the common law duty to obtain informed consent, a physician is required to advise a woman, who is in the sixth to eighth week of pregnancy, that an abortion procedure will kill not just a potential life, but an actual existing human being. We first turn to the law of duty in general, then to a physician's duty to ensure a patient has material information to give informed consent, and last decide whether physicians have a legal duty to give the instructions proposed by plaintiff.

A duty is an obligation imposed by law requiring one party "to conform to a particular standard of conduct toward another." *Prosser & Keeton on Torts: Lawyer's Edition* § 53, at 356 (W. Page Keeton ed., 5th ed.1984). The recognition or establishment of a legal duty in tort law is generally a matter for a court to decide. *Clohesy v. Food Circus Supermarkets*, 149 *N.J.* 496, 502, 694 *A.*2d 1017 (1997). One scholarly treatise has put the issue in quite simple, if not specific, terms: "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *Prosser*, *supra*, at 359. Central to the determination of whether a duty does or should exist is a "value judgment, based on an analysis of public policy," *Kelly v. Gwinnell*, 96 *N.J.* 538, 544, 476 *A.*2d 1219 (1984), and notions of fairness, *Hopkins v. Fox & Lazo Realtors*, 132 *N.J.* 426, 439, 625 *A.*2d 1110 (1993). The fairness and public policy considerations involve weighing several factors: " 'the relationship of the

parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.' " *Carvalho v. Toll Bros. & Developers*, 143 *N.J.* 565, 573, 675 *A.*2d 209 (1996) (quoting *Hopkins*, *supra*, 132 *N.J.* at 439, 625 *A.*2d 1110).

In weighing competing public policy concerns, courts must consider the real-life consequences of imposing a duty and cannot be oblivious of the social realities of the day. In short, courts should be reluctant to impose a duty that society is unwilling to accept. Courts also must be conscious of whether the "desirable policy" proposed by a party "is the subject of intense controversy" and therefore likely to be divisive. *Kelly*, *supra*, 96 *N.J.* at 545, 476 *A.*2d 1219.

C.

The underlying basis for the doctrine of informed consent is a patient's right of self-determination, the right to intelligently decide whether to choose or decline a particular medical procedure. *See Niemiera v. Schneider*, 114 *N.J.* 550, 562, 555 *A.*2d 1112 (1989); *Schloendorff v. Soc'y of the N.Y. Hosp.*, 211 *N.Y.* 125, 105 *N.E.* 92, 93 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."), *overruled on other grounds*, *Bing v. Thunig*, 2 *N.Y.*2d 656, 163 *N.Y.S.*2d 3, 143 *N.E.*2d 3 (1957). The informed consent doctrine has evolved from a concept originally

sounding in battery to a firmly established principle of negligence involving the duty of care a doctor owes his patient. *Howard v. Univ. of Med. & Dentistry of N.J.*, 172 *N.J.* 537, 546-47, 800 *A.*2d 73 (2002).

It is now settled that a physician has a legal duty to disclose to the patient all medical information that a reasonably prudent patient would find material before deciding whether to undergo a medical procedure. *Largey v. Rothman*, 110 *N.J.* 204, 211-12, 540 *A.*2d 504 (1988). The standard focuses on what a *reasonable* patient needs to know-that is, what a *reasonable* patient would likely find significant given the risks-to make an informed decision in foregoing or assenting to a medical procedure. *Howard, supra*, 172 *N.J.* at 547, 800 *A.*2d 73; *see also Matthies v. Mastromonaco*, 160 *N.J.* 26, 36, 733 *A.*2d 456 (1999) ("The standard obligates the physician to disclose only that information material to a reasonable patient's informed decision."). Generally, the physician is required to inform the patient of the available medical options, the risks associated with those options, and the nature of the intended procedure. *Howard, supra*, 172 *N.J.* at 548, 800 *A.*2d 73; *Largey, supra*, 110 *N.J.* at 208, 540 *A.*2d 504.

A plaintiff filing a negligence action predicated on lack of informed consent, such as in this case, must demonstrate that a physician withheld *medical information* that a reasonably prudent pregnant woman in like circumstances would have considered material before consenting to a termination of pregnancy. *Howard, supra*, 172 *N.J.* at 548, 800 *A.*2d 73 (stating that

"patient must prove that the doctor withheld pertinent medical information concerning the risks of the procedure"); *Blazoski v. Cook*, 346 *N.J.Super.* 256, 270, 787 *A.*2d 910 (App.Div.2002) ("Actions for informed consent are limited to the nondisclosure of medical information."); *see also Model Jury Charge (Civil)* § 5.36(C) (Mar.2002) ("The doctor has a duty to explain, in words the patient can understand, all material medical information and risks."). *See generally* American Medical Association, *Code of Medical Ethics: Current Opinions with Annotations*, Opinion 8.08 (1981) ("The physician's obligation is to present the medical facts accurately to the patient. . . .").

D.

Plaintiff is prepared to present expert testimony to establish, as a biological fact, that her embryo was "an existing human being"-"a member of the species Homo sapiens" — at the time of the abortion. Defendant, however, can present expert witnesses who will dispute the point and who will assert that plaintiff's characterization of the embryo as a living human being is a moral, theological, or ideological judgment, not a scientific or biological one. Clearly, there is no consensus in the medical community or society supporting plaintiff's position that a six- to eight-week-old embryo is, as a matter of biological fact-as opposed to a moral, theological, or philosophical judgment-"a complete, separate, unique and irreplaceable human being" or that terminating an early pregnancy involves "actually killing an existing human being."

Appendix A

The instructions that plaintiff would have us mandate obstetricians to give are certainly not the medical professional norm within this State, as noted by *amicus* the New Jersey Obstetric and Gynecology Society. Plaintiff has not pointed out whether even a small minority of physicians currently give such instructions. Plaintiff has not directed us to any jurisdiction or any court that has found a common law duty requiring doctors to tell their pregnant patients that aborting an embryo is the killing of an existing human being-an instruction suggesting that both the doctor and patient would be complicit in committing the equivalent of murder.

Plaintiff cannot find support for creating the legal duty she seeks to impose on doctors in either this State's law or federal law. For example, in construing New Jersey's Wrongful Death Act, this Court concluded that the Legislature did not intend to include a fetus within the definition of a "person" covered by the Act. *Giardina, supra*, 111 *N.J.* at 420-21, 428, 545 *A.*2d 139. Accordingly, the "Act does not permit recovery attributable to the wrongful death of an infant before birth." *Id.* at 413, 545 *A.*2d 139.

Additionally, as the *Giardina* Court observed, in enacting the New Jersey Code of Criminal Justice, "the Legislature considered and rejected the opportunity to classify a fetus as a 'person' " under our current homicide statutes. *Id.* at 422, 545 *A.*2d 139 (citing 2 *Final Report of the New Jersey Criminal Law Revision Commission: Commentary* 150 (1971)). The Final Report noted "that

at common-law homicide could be committed only against a 'human being' and that [a human being] did not include a fetus." *Ibid; see also State in the Interest of A.W.S.*, 182 *N.J.Super.* 278, 280, 440 *A.*2d 1144 (App.Div.1981) (concluding that homicide statutes do not apply to fetal death based on review of legislative history and common law).

The United States Supreme Court in *Roe, supra,* eschewed answering the "difficult question of when life begins," stating that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 *U.S.* at 159, 93 *S.Ct.* at 730, 35 *L.Ed.*2d at 181. In *Casey, supra,* the United States Supreme Court repeatedly refers, when speaking of a fetus or embryo, to the State's "interest in potential life," and scrupulously avoids describing either a fetus or an embryo as an existing human being. 505 *U.S.* at 875-76, 112 *S.Ct.* at 2820, 120 *L.Ed.*2d at 714; *see also Gonzales v. Carhart*, 550 *U.S.* __, 127 *S.Ct.* 1610, 1626, 167 *L.Ed.*2d 480, 502 (2007) (noting that *Casey* recognized importance of "State's interest in potential life"). In *Casey, supra,* the Court held that a state could not enact a regulation placing an "undue burden" on "a woman seeking an abortion of a nonviable fetus." 505 *U.S.* at 877, 112 *S.Ct.* at 2820, 120 *L.Ed.*2d at 714-15. The Court also recognized that, in certain circumstances, a physician might have a First Amendment right to be free from government-compelled speech. *Id.* at 884, 112 *S.Ct.* at 2824, 120

*L.Ed.*2d at 719; *see also Wooley v. Maynard*, 430 *U.S.* 705, 714, 97 *S.Ct.* 1428, 1435, 51 *L.Ed.*2d 752, 762 (1977) (stating that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

It also bears mentioning that a panel of the United States Court of Appeals for the Eighth Circuit upheld a United States District Court's preliminary injunction of a South Dakota statute mandating that a doctor disclose to a patient seeking an abortion information similar to the "biological facts" that plaintiff urges that we include in our common law doctrine of informed consent. *Planned Parenthood Minn. v. Rounds*, 467 *F.*3d 716, 719 (8th Cir.2006), *vacated for rehearing en banc as stated in*, 213 *Fed. Appx.* 508 (8th Cir.2007). The South Dakota statute requires that a physician, before performing an abortion and as a precondition to informed consent, advise the patient that "the abortion will terminate the life of a whole, separate, unique, living human being" and that "by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated." *S.D. Codified Laws* § 34-23A-10.1(1)(b), (d). The statute defines "human being" as an "individual living member of the species of Homo sapiens." *S.D. Codified Laws* § 34-23A-1(4). The panel was unaware of any federal appellate court having reviewed similar disclosure requirements. *Rounds*, *supra*, 467 *F.*3d at 726. A majority of the panel upheld the district court's preliminary injunction because the compelled disclosures "could be found to violate both the

First Amendment rights of physicians and the due process rights of women seeking abortion." *Id.* at 727. The panel's decision has been vacated and the matter will be determined *en banc.*

Rounds, of course, addresses a statute enacted by the democratically elected representatives of a state whereas plaintiff is urging this Court to adopt through its common law the informed consent provisions of that highly controversial statute. Clearly, the compelled disclosure required by the South Dakota Legislature is pushing the doctrine of informed consent to the edge of a new constitutional fault line. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 *U. Ill. L.Rev.* 939, 956-60 (2007) (noting that to compel physicians to tell pregnant women that embryo or fetus is "human being" would "appear to compel a physician to proclaim 'adherence to an ideological point of view he finds unacceptable,' and in that way to justify rigorous and almost certainly fatal First Amendment scrutiny").

We need not reach the constitutional arguments raised by defendants and *amici* who claim that it is both an undue burden on a woman's right of self-determination and a violation of a physician's First Amendment free speech right to compel a physician to advise a pregnant woman that an embryo is an existing human being and that an abortion is tantamount to killing a child. We do not resolve those arguments because we cannot find that New Jersey's common law imposes a legal duty on a physician to give the instructions sought

by plaintiff. In light of our judicial precedents, we will not place a duty on doctors when there is no consensus in the medical community or among the public supporting plaintiff's assertions.

On the profound issue of when life begins, this Court cannot drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arrayed along a deep societal and philosophical divide. We are not unmindful of the raging debate that has roiled the nation and of the sincerely and passionately held beliefs by those on opposite sides of the debate. We are sympathetic to the deep pain plaintiff has suffered in the aftermath of the termination of her pregnancy. However, the common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion *only* with material medical information, including gestational stage and medical risks involved in the procedure. Under that doctrine of informed consent, the knowledge that plaintiff sought from defendant cannot be compelled from a doctor who may have a different scientific, moral, or philosophical viewpoint on the issue of when life begins. Therefore, we do not find that the common law commands a physician to inform a pregnant patient that an embryo is an existing, living human being and that an abortion results in the killing of a family member.

III.

We have considered plaintiff's argument as she has presented it to us both in her briefs and oral argument to this Court. Plaintiff has articulated one basic legal ground underpinning her lack-of-informed-consent claim-defendant's failure to disclose that her embryo was an existing human being. As we have concluded, defendant had no legal duty to make such a disclosure.

Because there are no material issues of fact in dispute and defendant is entitled to judgment as a matter of law, we conclude that the Appellate Division erred in reversing the motion judge's order granting summary judgment in defendant's favor. We therefore reinstate the order dismissing plaintiff's lack-of-informed-consent and emotional distress claims, which were the only remaining claims in this case.

JUSTICE LONG, LaVECCHIA, WALLACE, and RIVERA-SOTO join in JUSTICE ALBIN's opinion. JUSTICE HOENS did not participate.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED APRIL 7, 2006

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4022-03T5
A-4023-03T5

ROSA ACUNA ADMINISTRATRIX AD PROSEQUENDUM and GENERAL ADMINISTRATRIX OF THE ESTATE OF ANDRES ACUNA,[1] Deceased Infant and Rosa Acuna Individually,

Plaintiffs-Appellants,

v.

SHELDON C. TURKISH, M.D., and THE OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, P.C.,

Defendants-Respondents.

Argued: April 18, 2005 — Decided: April 7, 2006

Before Judges A. A. RODRÍGUEZ, CUFF and HOENS.

---

1. The second amended complaint refers to "Michael Doe, (fictitious name of a real individual), deceased infant." The third amended complaint refers to "Andres Acuna, deceased infant."

Appendix B

The opinion of the court was delivered by

RODRÍGUEZ, A. A., P.J.A.D.

Plaintiff, Rosa Acuna, appeals from the summary judgment dismissing her complaint against defendants Sheldon C. Turkish, M.D. and his medical group, the Obstetrical and Gynecological Group of Perth Amboy-Edison, P.C. (collectively "defendants"). We reverse.

Some aspects of the dispute between these parties were the subject of an earlier decision of this court. *See Acuna v. Turkish*, 354 *N.J.Super.* 500, 808 *A.*2d 149 (App.Div.2002). Because that decision bears directly on the issues now before us, we must first set out the essential facts and the procedural history of this litigation.

At the time of the events in question, Acuna was twenty-nine years old. She was married and was the mother of two daughters. Those children had been born of Acuna's second and third pregnancies, her first pregnancy having ended in a miscarriage in 1993. On April 6, 1996, Acuna consulted Turkish, an obstetrician and gynecologist who had delivered Acuna's second child, because she was suffering from abdominal pain.

After Turkish examined Acuna, he advised her that she was pregnant for the fourth time. The pregnancy was in its sixth to seventh week. He also advised her that she should terminate the pregnancy for medical reasons. According to Acuna, Turkish told her that she

"needed an abortion because [y]our kidneys are messing you up." Since the time she had been in high school, Acuna had suffered from renal glycosuria, a disorder of the kidneys. Acuna asked Turkish whether "the baby was already there." According to Acuna, Turkish replied, "Don't be stupid, it's only blood."

At her deposition, Acuna shed some light on her understanding of the word "pregnant." She testified that, "[O]bviously I knew I was pregnant, I just needed to know and I wanted to know if the baby was—if there was a baby already in me." In the following deposition excerpt, Acuna further explained her understanding of what it means to be pregnant.

> [TURKISH'S COUNSEL]: Q. What did that word pregnant mean to you in your mind in January 1993 [the time of her miscarriage]?
>
> [ACUNA'S COUNSEL]: A. As long as you give the month, that was fine.
>
> [ACUNA]: That eventually somewhere down the line I was going to have a baby.
>
> [TURKISH'S COUNSEL]: Q. In your mind in January of 1993, more specifically than somewhere down the line you're going to have a baby, what in your mind was happening inside your body in January of 1993?

> [ACUNA]: A. I didn't know exactly what was happening inside my body. I knew I had gotten pregnant but I didn't know exactly what was forming inside my body at this moment.

Following the April 6, 1996 examination by Turkish, Acuna discussed the physician's advice with her husband. Three days later, she signed a consent form for an abortion. Turkish performed a vacuum aspiration. However, Acuna continued to bleed. Seven weeks later, Acuna went to Robert Wood Johnson Hospital where she was diagnosed with an incomplete abortion. Acuna underwent a dilation and curettage. According to her, one of the nurses caring for her explained that the procedure was necessary because Turkish "had left parts of the baby inside of [her]." Thus, Acuna concluded based on the reference to "the baby" that she had given consent to an abortion based on erroneous information.

Acuna filed an eleven-count complaint against defendants and a fictitiously named nurse.[2] There were two amendments to the complaint. The second amended complaint asserted causes of action on behalf of Acuna for medical malpractice and negligent infliction of emotional distress based on lack of informed consent and negligent performance of the abortion. The complaint also alleged causes of action on behalf of "the estate of Michael Doe (ficitious name of a real individual), deceased infant of Rosa Acuna" in the nature of wrongful death and survival claims.

---

2. The counts alleging causes of action against the fictitiously named nurse were subsequently abandoned.

Appendix B

In 2001, defendants moved for summary judgment on the emotional distress, wrongful death, and survival claims. Following oral argument, the motion judge granted defendants' motion and dismissed these claims. Acuna's motion for reconsideration was denied. This court then granted Acuna's motion for interlocutory review of the dismissal of the wrongful death and the emotional distress claims only. We affirmed the dismissal of the wrongful death claim, but reversed the dismissal of the emotional distress claim and remanded for further proceedings. *Acuna, supra*, 354 *N.J.Super.* at 505, 808 *A.*2d 149.

As that opinion notes, the review of the summary judgment order as it related to the emotional distress claim rested on the following assumptions: (1) Turkish "owed a duty to [Acuna] to disclose all material information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy;" and (2) Turkish "breached that duty, and the breach was a proximate cause of [Acuna's] choice to undergo the procedure." *Id.* at 514-15, 808 *A.*2d 149.

In that earlier opinion, we rejected the motion judge's conclusion that, although there were factual issues concerning the informed consent issue, Acuna was not entitled to proceed on her informed consent claim because the "fetus"[3] was not a constitutional person.

3. In our earlier opinion, we used the term fetus because it was the term used by the motion judge to refer to Michael Doe. Medically speaking, the correct term would have been embryo,

(Cont'd)

Id. at 515, 808 *A.*2d 149. We noted that in *Roe v. Wade*, 410 *U.S.* 113, 158, 93 *S.Ct.* 705, 729, 35 *L.Ed.*2d 147, 180 (1973), the United States Supreme Court held that, "the word 'person' as used in the Fourteenth Amendment does not include the 'unborn.' " Notwithstanding that, we concluded that with respect to Acuna's emotional distress claim:

> *Roe* is not dispositive here because this is not a case implicating a government's attempt to limit a woman's privacy right to terminate a pregnancy. Crediting plaintiff's proofs, it is about a woman who claims severe emotional distress caused by medical advice resulting in her grudging consent to terminate a pregnancy, purportedly given because of defendant's failure to advise her of the material consequences of the procedure. The fact that a fetus may not be a 'person' under the Fourteenth Amendment is irrelevant because plaintiff's claim is not dependent upon whether or not the fetus enjoys a constitutional status as a 'person.' The claimed malpractice committed by defendant was directed against plaintiff as an expectant mother and thus was a direct, not a derivative claim.

(Cont'd)

given the undisputed six to seven week gestational age. Embryo is defined as "in human beings, the developing organism from conception until approximately the end of the second month." A fetus "represents the product of conception from the end of the eight week to the moment of birth." *Stedman's Concise Medical Dictionary*, 326, 375 (2d ed.1994).

> *See Giardina*,[4] 111 *N.J.* at 413, 545 *A.*2d 139 ('the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury . . .').
>
> [*Acuna, supra*, 354 *N.J.Super.* at 515, 808 *A.*2d 149.]

We then concluded that Acuna's emotional distress claim is "well founded" pursuant to New Jersey case law, relying on *Giardina* and *Portee v. Jaffee*, 84 *N.J.* 88, 417 *A.*2d 521 (1980). Accordingly, we remanded for resolution of the factual issues regarding informed consent.

Following that remand, Acuna filed her third amended complaint, in which she identified Michael Doe as "Andres Acuna" and essentially reasserted all of the claims, including the wrongful death and survival counts that had been dismissed. The parties thereafter engaged in extensive discovery directed to the informed consent issue. In 2003, defendants moved for summary judgment seeking dismissal of all counts of the complaint. A different judge heard the motion. Acuna's counsel conceded to the judge at oral argument that only two claims remained. These claims, both based on the lack of informed consent, are negligent infliction of emotional distress (styled as the *Giardina-Portee* claim), and a claim for physical injury to Acuna. Counsel explained that the claim for negligent performance of the abortion had been abandoned.

---

4. *Giardina v. Bennett*, 111 *N.J.* 412, 545 *A.*2d 139 (1988).

Appendix B

The judge granted defendants' motion and dismissed the informed consent claims in a written opinion. Acuna moved for reconsideration and for leave to file a fourth amended complaint. The proposed fourth amended complaint did not assert a new cause of action. According to Acuna's counsel, the amendment "would in much greater detail set forth [Acuna's] uninformed consent negligence claim." The judge denied the motions for reconsideration and for leave to file a fourth amended complaint.

Acuna filed two appeals, one in her individual capacity challenging the dismissal of her informed consent claims (A-4022-03) and one in her capacity as administratrix of the estate of the aborted embryo for its wrongful death (A-4023-03). We calendared these separate appeals back-to-back and we address them in this single opinion.

The Informed Consent Claims (A-4022-03T5)

At the outset we note that Acuna does not allege that the abortion was performed against her will. She concedes that she consented to the procedure, but she argues that she was given insufficient information by Turkish to allow her to make an intelligent, informed decision regarding the abortion. As a result, according to Acuna's expert, she suffered severe emotional and psychological trauma, which led to the development of acute post-traumatic disorder, major clinical depression and psychosexual dysfunction.

Appendix B

Acuna's first contention on appeal is premised on the following statement: "[T]he Appellate Division already ruled in this case that the doctor must disclose that a pregnant mother's unborn child is in existence *before* she can make an informed decision of whether or not to submit to the procedure." Because this premise is not consistent with our previous holding, we are constrained to reiterate our earlier analysis here.

In discussing Acuna's claim for emotional distress pursuant to *Giardina-Portee* based upon lack of informed consent, we said:

> [A] woman's right to determine for herself whether or not to continue or terminate her pregnancy . . . protects a distinctively personal interest, . . . [b]ased on a woman's circumstances and discrete moral and religious beliefs, to choose not to terminate the pregnancy after being informed by her physician regarding the status of the fetus and all other facts that may be deemed material in making that choice. The wrongful birth of a baby with a congenital defect may obviously give rise to profound mental anguish. Based on the circumstances, background and beliefs of a mother, inducing her to terminate the pregnancy, even at eight weeks, because of the physician's failure to obtain an informed consent may also result in severe distress and mental anguish.
>
> [*Acuna, supra*, 354 *N.J.Super.* at 518, 808 *A.*2d 149 (citations omitted).]

Appendix B

Requiring a physician to give information "regarding the status of the fetus and all other facts that may be deemed material in making that choice" is very different than requiring a physician to disclose to a pregnant mother that "her unborn child is in existence *before* she can make an informed decision on whether or not to submit to the procedure." In *Acuna, supra*, we determined that, in the context of an abortion, the information to be disclosed was fact-sensitive and remanded for development of the record.

Here, Acuna alleges that her consent to an abortion was "uninformed" because Turkish failed to accurately answer her question, "[I]s the baby already there?" More particularly, she argues that "if New Jersey does not require a complete disclosure that helps the mother understand that the life of an *existing family member* will be terminated, then [her] protection and due process rights would be violated." (emphasis added).

Based on this articulation of her argument, it is apparent that Acuna considered the embryo, six or seven weeks after conception, to have been "an existing family member." Therefore, she believes that there was a single correct answer to her question. She thus concludes that only an affirmative answer would have discharged Turkish's duty to provide sufficient information to allow her to make an informed decision about an abortion. Defining her claim in this fashion does not help the analysis of this informed consent case. In the informed consent context, the standard to be applied is an objective one. *See Canesi v. Wilson*, 158 *N.J.* 490, 506,

730 *A.*2d 805 (1999). The standard is derived from what a reasonably prudent patient would deem to be significant to a decision rather than what any particular patient believes. *See Largey v. Rothman*, 110 *N.J.* 204, 213, 540 *A.*2d 504 (1988). Obviously, the term "baby" meant something different to Acuna and Turkish. For her, it meant an embryo or fetus; for the doctor, a human being following birth. Arguably, from Turkish's perspective, he answered correctly, and discharged his duty to his patient by indicating that there was no "baby" there.

Although we do not agree with Acuna's interpretation of our earlier opinion or with her argument that there was a single correct answer that Turkish failed to provide, we find merit in her assertion that the judge erred in granting summary judgment. We do so, however, for entirely different reasons than those advanced in Acuna's brief.

It is well-settled that in a non-emergent situation, a physician must obtain a patient's informed consent before the physician may treat or operate on the patient. *Largey, supra*, 110 *N.J.* at 207, 540 *A.*2d 504; *see also Niemiera v. Schneider*, 114 *N.J.* 550, 555 *A.*2d 1112 (1989). The physician has a duty to explain, in terms understandable to the patient, what he or she intends to do before subjecting the patient to a course of treatment or an operation. *Matter of Farrell*, 108 *N.J.* 335, 347, 529 *A.*2d 404 (1987). The reason for the existence of this duty is to protect each person's right to self-determination in matters of medical treatment. *Ibid.*

"Physicians . . . have a duty to evaluate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances." *Matthies v. Mastromonaco*, 160 *N.J.* 26, 34, 733 *A.*2d 456 (1999).

In order to obtain the patient's informed consent, the physician must tell the patient not only about the alternatives that he or she recommends, but also about all medically reasonable alternatives that the doctor does not recommend. *Id.* at 37, 733 *A.*2d 456. The physician has a duty to explain, in words the patient can understand, all material medical information and risks. Medical information or a risk of a medical procedure is material when a reasonable patient in the plaintiff's position would be likely to attach significance to it in deciding whether or not to submit to the treatment. *Id.* at 37-39, 733 *A.*2d 456; *see Canesi*, *supra*, 158 *N.J.* at 511 n. 5, 730 *A.*2d 805. Moreover, a physician does not adequately discharge his or her responsibility by disclosing only the treatment alternatives that are recommended. *Matthies*, *supra*, 160 *N.J.* at 37-39, 733 *A.*2d 456. "Accordingly, the physician should discuss the medically reasonable courses of treatment, including non-treatment" and their attendant probable risks and outcomes. *Id.* at 38, 733 *A.*2d 456.

Applying these well-settled principles of informed consent to this record, we must reverse the summary judgment dismissing Acuna's emotional distress claim. The issue presented here is quite narrow, i.e. what medical information is material and must be disclosed

by an obstetrician when advising a patient to terminate a pregnancy and what medical information is material when the patient asks if the "baby" is already "there?"

In addressing this question, the standard against which Turkish's communication with Acuna should be measured is not a legal issue to be defined by this court. Nor is it established by expert testimony. *See Largey, supra*, 110 *N.J.* at 213-14, 540 *A.*2d 504. Rather, "[w]henever non-disclosure of particular risk information is open to debate by reasonable-minded [people], the issue is one for the finder of facts." *Id.* at 213, 540 *A.*2d 504 (quoting *Canterbury v. Spence*, 464 *F.*2d 772, 788 (D.C.Cir.), *cert. denied*, 409 *U.S.* 1064, 93 *S.Ct.* 560, 34 *L. Ed.*2d 518 (1972)); *see Sgro v. Ross*, 337 *N.J.Super.* 220, 226, 766 *A.*2d 1147 (App.Div.1998), *aff'd*, 166 *N.J.* 338, 765 *A.*2d 745 (2001). Therefore, while both parties are free to present testimony of experts who are deemed by the trial court to be qualified to testify and to express an opinion, the finder of fact ultimately will be required to address that debate in the context of the reasonably prudent patient standard.

Here, accepting Acuna's version of the facts as true, *see Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 540, 666 *A.*2d 146 (1995), we conclude that summary judgment was inappropriate because a reasonable patient would not have received the information necessary to make an informed decision. Because we conclude that summary judgment should be reversed, we do not address Acuna's additional arguments that "it was error for the Law Division to dismiss the complaint on the ground the

complaint only alleged the doctor failed to make a single disclosure" or that "it was further error for the court to deny Acuna to amend the complaint."

The Wrongful Death Claim (A-4023-03T5)

Acuna contends that the dismissal of the wrongful death claim under *N.J.S.A.* 2A:31-1 to -6 violated her right to equal protection of the law. As already noted, in the earlier appeal, we affirmed the dismissal by the first motion judge of the wrongful death claims. *Acuna*, *supra*, 354 *N.J.Super.* at 507-13, 808 *A.*2d 149. An appellate decision on the merits is final though it does not terminate the case, and it becomes the law of the case. *State v. Myers*, 239 *N.J.Super.* 158, 164, 570 *A.*2d 1260 (App.Div.), *certif. denied*, 127 *N.J.* 323, 604 *A.*2d 598 (1990). Such a decision is not tentative, or subject to later review. *Ibid.* Generally, "[p]rior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." *Sisler v. Gannett Co., Inc.*, 222 *N.J.Super.* 153, 159, 536 *A.*2d 299 (App.Div.1987), *certif. denied*, 110 *N.J.* 304, 540 *A.*2d 1283 (1988). The doctrine is more stringent when applied to an appellate decision in the same case than it is when applied to prior trial court decisions in the same case. *In re SMB Assocs. v. Dep't of Envtl. Prot.*, 264 *N.J.Super.* 38, 60, 624 *A.*2d 14 (App.Div.1993), *aff'd*, 137 *N.J.* 58, 644 *A.*2d 558 (1994).

Here, the evidence and arguments presented following the remand are not substantially different. Therefore, we decline to address, for a second time, the merits of the issues raised in A-4023-03T5.

Appendix B

Summarizing, we reverse the summary judgment entered on Acuna's informed consent claim in A-4022-03T5 and we remand that matter for further proceedings consistent with this opinion, and we decline to address the issues raised in A-4023-03T5.

Reversed and remanded for further proceedings.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DECIDED MARCH 3, 2004

SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO. L-3812-98

ROSA ACUNA

Plaintiff,

V.

SHELDON C. TURKISH, M.D.

Defendant.

Decided: March 3, 2004

CHAMBERS, P.J.S.C.

The defendant's motion for summary judgment was granted, and plaintiff's motion for reconsideration is denied for the reasons set forth below.

In this medical malpractice case plaintiff, Rosa Acuna contends that her physician defendant, Sheldon Turkish, M.D. failed to obtain her informed consent when he terminated her pregnancy. Specifically, she maintains that the doctor failed to advise her that the procedure would end the life of a living human being and would deprive her of her relationship with a living offspring.

She contends that the doctor should have told her that the procedure would not merely prevent a child from coming into existence but would kill a then living member of her family. Since plaintiff was carrying an embryo no more than seven weeks old, this decision concerns a physician's duty with respect to a woman carrying a nonviable fetus.

This claim must fail since plaintiff understood that she had growing within her a developing human being, that if she continued her pregnancy in the normal course of events she would give birth to a child, and she understood that by agreeing to the procedure to terminate her pregnancy she would not have the child. In light of this, by insisting that the doctor should have told her before the abortion that she was carrying a living human being, plaintiff is attempting to require the doctor to express a moral, philosophical or religious judgment that goes beyond the medical information he is obligated to provide.

Notably, this case does not involve the separate question concerning the information a doctor should provide a patient about the stage of development of her embryo or fetus. While this information may be relevant to some women, plaintiff in this case takes the position that a member of her family came into existence at the time of conception, and hence from her point of view, an abortion at any point in the process would entail killing a family member. For this reason, the stage of development of the embryo is not material here.

Appendix C

FACTUAL BACKGROUND

At the time of the events that give rise to this lawsuit, plaintiff was 29 years old, had grown up in New Jersey and New York, had attended high school, and had given birth to two children. The defendant doctor had been her physician for five years, and he had delivered her second child about nine and a half months before her visit to his office on April 6, 1996. Plaintiff maintains that she went to the defendant's office on that date due to abdominal pain. In the course of the visit, an ultrasound test was done, and plaintiff learned that she was pregnant. Since her last menstrual period was February 21, 1996, the embryo was not more than seven weeks old; the defense calculates that it was five weeks old from the time of conception.

At this juncture, on April 6, 1996, the doctor and plaintiff discussed the situation, including terminating the pregnancy. Plaintiff maintains that the doctor suggested the procedure. According to plaintiff, she asked the doctor if the "baby was already there," and the doctor responded, "don't be stupid, it is nothing but some blood." While the defendant does not remember the conversation, he testified at his deposition that, if asked the question, he would have responded that: "It's not what I would call a child. Okay. That is just tissue at this time."

Plaintiff was sent home on April 6, 1996 and returned to the doctor's office on April 9, 1996 to have the pregnancy terminated. She signed a consent form which

read: "I hereby give my consent for Dr. Turkish to perform a TOP [termination of pregnancy]. He has explained all of the risks and complications to me." The procedure was performed that day.

Four weeks after the procedure, on May 5, 1996, plaintiff was rushed to the hospital due to hemorrhaging. According to plaintiff, when she asked a nurse at the hospital what was wrong, the nurse said: "They left part of your baby in you." (Defendant notes that the tissue removed at the hospital on May 5, 1996 consisted of a fragment of chorionic villi, the lining of the uterus and not fetal parts.)

Plaintiff has testified that after she went home from the hospital on May 6, 1996, she went to the library and did further reading and consultation on human development. She has now reached the conclusion that the embryo was a living human being and that the doctor terminated her relationship with a living offspring whom she has named Andres.

Plaintiff claims that due to the death of this unborn child, she has suffered emotional distress. She asserts that the doctor failed to obtain her informed consent because he failed to advise her that she had a living human being within her and that she would be terminating her relationship with an existing offspring.

The defendant moved for summary judgment maintaining that these facts do not support a claim for medical negligence. That motion was granted, and the plaintiff has moved for reconsideration.

Appendix C

THE APPELLATE DIVISION DECISION

This case has already been to the Appellate Division on a previous motion for summary judgment. *Acuna v. Turkish*, 354 *N.J.Super.* 500 (App. Div. 2002). Plaintiff maintains that the issue raised in this motion has already been addressed by the Appellate Division, and accordingly, summary judgment for the defense should not be granted.

Earlier in this litigation the previous trial judge had dismissed plaintiff's claim for emotional distress due to the termination of her pregnancy. The trial court reasoned that a cause of action for emotional distress under *Portee v. Jaffe*, 84 *N.J.* 88, 101 (1980) requires that there be a marital, or intimate, familial relationship between the plaintiff and the injured 'person'. Relying on *Roe v. Wade*, 410 *U.S.* 113 (1973), the trial court in a letter opinion found that the fetus under eight weeks old could not be considered a constitutional 'person' and hence the plaintiff's emotional distress claim must fail.

The Appellate Division reversed, holding that a woman may have a direct claim on her own behalf for emotional distress when a physician terminates her pregnancy without obtaining her informed consent. *Acuna v. Turkish*, *supra*, 354 *N.J. Super* at 517-518. This claim for emotional distress is described as a "logical complement to the 'wrongful birth' cases, which involve a 'violation of the interest in self-determination,' and which focus on 'the parents' lost opportunity to make the personal decision of whether or not to give birth to a

child who might have birth defects'." *Id.* at 518 (citations omitted). In reaching this conclusion, the Appellate Court relied on *Giardina v. Bennett*, 111 *N.J.* 412 (1988) which recognized a claim for emotional distress to parents of a stillborn child. The Appellate Division expressly extended the *Giardina* cause of action to plaintiff. *Id.* at 517. The United States Supreme Court decision in *Roe v. Wade* was not considered dispositive since that case concerned government action and the Due Process Clause of the Fourteenth Amendment, issues not implicated here.

The previous *Acuna* opinion, then, clearly establishes that a medical negligence claim for emotional distress may be maintained by a woman against a physician who terminates her pregnancy without obtaining her informed consent. The Appellate Division in *Acuna*, however, did not reach the question of whether or not a material issue of fact on informed consent is present in this case. In summarizing its holding on the emotional distress claim, the court wrote:

> *In the event plaintiff establishes a medical malpractice claim based on a lack of informed consent*, defendant's tortious conduct constitutes a direct tort against plaintiff, entailing emotional distress and mental suffering arising from the loss of a fetus.
>
> [*Acuna, supra*, 354 *N.J. Super.* at 505. (emphasis supplied)]

Appendix C

Later in the opinion, the Appellate Division expressly stated that for the purpose of the discussion, it will assume that defendant owed a duty to disclose to plaintiff all material information that a prudent patient might find significant in reaching a decision whether to end her pregnancy. *Id.* at 514. The court also assumed that the defendant had breached that duty and that the breach was a proximate cause of plaintiff's decision to terminate the pregnancy. *Id.* at 514-515. In so stating, the court wrote:

> Consequently, solely for the purpose of addressing the narrow issue before us, we will assume that defendant owed a duty to plaintiff to disclose all material information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy. We also *assume that defendant breached that duty*, and the breach was a proximate cause of plaintiff's choice to undergo the procedure.
>
> [*Ibid.* (emphasis supplied)]

The issue in this motion is not whether a claim exists for emotional distress when a pregnancy is terminated by a physician without informed consent. That question has been definitively answered in the affirmative in *Acuna*. Rather the question presented in this motion is whether the facts alleged in this case can support a claim that plaintiff did not give informed consent to the procedure. This issue was not before the *Acuna* court. Indeed, with

the agreement of the parties, the *Acuna*, court found it premature to determine the scope of the physician's duty of care in this context, writing:

> [D]uring oral argument before us, both parties have agreed that it is premature to define what duty of care is owed by a physician in this context. The parties also rightly agree that we should not, at this posture of the case, address the fact-sensitive issues concerning what dangers incident to, or consequences resulting from, such a procedure would be 'material' to the 'prudent patient'. Both parties concur that resolution of these issues should await a complete factual record.
>
> [*Id.* at 514.]

Plaintiff seizes on this reference to a "complete factual record" to argue that the Appellate Division is requiring a full jury trial. However, the Appellate Division did not say that the issue must be resolved at trial. Once discovery is complete on an issue and the parties have had an opportunity to fully brief the issue and present all parts of the factual record they deem relevant, the court then is in a position to decide through a motion for summary judgment whether the issue can be resolved on motion or whether there are material issues of fact which must be resolved at trial. See *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1955).

Appendix C

The question of whether the doctor had a duty to advise the plaintiff that the embryo was a living human being, an existing member of her family, was not decided by the previous trial judge nor by the Appellate Division. The decisions of those courts focused on whether a cause of action existed if that duty was breached. That question having been answered in the affirmative, namely a cause of action arises when the duty is breached, this court must now address the next question which is whether that duty was breached in this case. The time is ripe for the court to take a look at this fact-sensitive issue.

In this effort, under the standard set forth in *Brill v. Guardian Life Insurance Company of Am.*, 142 *N.J.* 520, 540 (1995), this court must look at the evidence, giving the plaintiff the benefit of all of the favorable inferences that can be drawn from the evidence, and determine whether a rational fact-finder could hold for the plaintiff and find that she did not give her informed consent to the termination of her pregnancy.

PLAINTIFF'S ARGUMENT

Plaintiff maintains that the defendant doctor failed to obtain her informed consent to the procedure to terminate her pregnancy because he did not advise her that she would be terminating the life of a living human being and she would be ending a relationship with an existing offspring. In her complaint, plaintiff claims that the defendant doctor had a duty to inform her that the embryo "was a complete, separate, unique and irreplaceable human being." She further asserts in the

complaint that the doctor should have advised her that the "abortion did not prevent a human being from coming into existence but actually killing an existing human being." In her brief in opposition to the motion, she asserts that "she did not know she was terminating a relationship with an existing offspring, nor did she know that the doctor would be terminating the life of a human being already in existence".

In the motion for reconsideration, plaintiff seeks to file a fourth amended complaint, but in the fourth amended complaint the cause of action is essentially still the same. As expressed in plaintiff's papers in the motion for reconsideration: "It is critical, therefore, that the pregnant mother be told in clear language that everyone can understand that the family member is already in existence and that the procedure — indeed the central purpose of the procedure — is intended to kill that family member. . . . Thinking one is preventing a human being from coming into existence and knowing that the procedure will kill an existing human being is profoundly different."

Plaintiff takes the position that the embryo she was carrying was a complete living human being. She maintains that this is material information that a reasonably prudent woman would view as significant in deciding whether or not to terminate her pregnancy. Plaintiff maintains that the doctor should have provided her with this information whether or not she questioned him about a baby being there. Accordingly, she has brought this lawsuit to recover for the emotional distress

she attributes to the doctor's negligence in failing to provide this information and obtain her informed consent.

In making this argument, plaintiff attempts to distinguish between what plaintiff contends is the purely scientific fact that the unborn child is a complete separate human being and the value judgment of whether one should place a value on the life of the unborn to the same extent as human beings born and alive. Plaintiff seeks to prove in this lawsuit that the embryo she was carrying was a complete human being.

Plaintiff has presented numerous reports and certifications from experts with impressive credentials to support her position that beginning at the time of conception a living human being is actually in existence. Detailed information has been presented on the process of fertilization and the development of the embryo and fetus. One pediatric geneticist explains that at the moment conception is complete a new human being exists, since the unique genetic code of the individual is present and all of the genetic information necessary to develop into that particular human being is present. A molecular biologist explains scientifically that at the moment after conception the DNA for the new human being is intact, and all of the programming for the growth of the human being is in place. A biologist sets forth a detailed account of human growth from the fertilized egg to embryonic development through the fetal stage to birth. (Under the definition in this biologist's report, plaintiff who was five to seven weeks pregnant was

carrying an embryo at the time of the procedure; hence, reference to the embryo in this decision.) A fetal surgeon's report indicates that fetal surgery usually cannot be performed during the first trimester because the embryo is too small, but it may be done in the second or third trimester. The surgeon also presents some evidence to support the belief that a fetus may experience pain. A pediatric neurologist addresses fetal pain more specifically, presenting evidence that suggests that a fetus may experience pain. Several doctors express the view that, when treating a pregnant woman, they also view the fetus as their patient. A woman who worked in a number of abortion clinics indicates that women considering abortion frequently ask the question "is it a baby?". A psychologist who has counseled women who have had abortions describes the psychological trauma women may experience after an abortion and expresses the opinion that the plaintiff in this case has suffered psychological injuries due to the termination of the pregnancy.

Plaintiff contends that based on this medical and scientific information, the defendant doctor should have told her that by terminating her pregnancy she would be terminating the life of a living human being and would be ending her relationship with an existing offspring.

DEFENDANT'S ARGUMENT

The defense maintains that the doctor had no duty to advise his patient that a living human being was present and would be killed by the abortion procedure.

Appendix C

According to the defense the question of when life begins is not a medical fact, but a question of philosophy, theology or morality.

The defense notes a wide variety of views which would pinpoint the beginning of human life at diverse other junctures, such as twelve days after fertilization (since at that point twins can form), or about twenty-seven weeks when the cerebral EEG (electroencephalogram) pattern begins (since loss of the cerebral EEG is recognized as death), or at the point of viability when the fetus can exist separately from its mother (this would be at the point lungs mature, or, due to technological advances, could be at twenty-two to twenty-four weeks) or at birth (when the child is independent from the mother and has its own functioning circulatory, alimentary and respiratory systems, and the umbilical cord is severed). Some take the position that there is no point at which life begins, since the sperm cell and egg cell are already alive. In short, defendant argues that authorities differ dramatically over when a human life begins. The defendant maintains that this is not medical information a doctor can provide in order to obtain informed consent.

The defense also raises various constitutional arguments maintaining that the statement plaintiff is demanding would place unconstitutional obstacles in the way of a woman seeking to exercise her constitutional rights under federal and state law to have an abortion. These constitutional questions need not be reached here, since the motions are resolved under the New Jersey law of informed consent.

Appendix C

LAW OF INFORMED CONSENT

Before performing a medical procedure, a physician is required to disclose to the patient all of the material information that a prudent patient would find significant when deciding whether or not to undergo the procedure. *Largey v. Rothman*, 110 *N.J.* 204, 211-12 (1988). The test is what a reasonable prudent patient would need to know, not necessarily what this particular patient believes she needed to know, in order to give consent to the procedure. *Ibid.* In addition, not all risks must be disclosed, but only those risks that a prudent patient would find material to the decision. "The test for determining whether a particular risk must be disclosed is its materiality to the patient's decision, ie., all risks potentially affecting the decision must be divulged." *Blazoski v. Cook*, 346 *N.J. Super.* 256, 268 (App. Div.) *certif. denied*, 172 *N.J.* 181 (2002).

In addition to establishing that the doctor failed to disclose material information, the plaintiff must also prove proximate cause, that is "a causal connection between the inadequately disclosed risk of the procedure and the injury sustained." *Howard v. UMDNJ*, 172 *N.J.* 537, 559 (2002). Once again an objective test is applied. *Largey v. Rothman, supra*, 110 *N.J.* at 215. The plaintiff must be able to show that if the disclosure had been adequate, a prudent person would reasonably be expected to decline treatment. *Id.* at 216.

The elements of a prima facie case for medical negligence due to lack of informed consent have been

enumerated as "(1) the physician failed to comply with the [reasonably-prudent-patient] standard for disclosure; (2) the undisclosed risk occurred and harmed the patient; (3) a reasonable person under the circumstances would not have consented and submitted to the operation or surgical procedure had he or she been so informed; and (4) the operation or surgical procedure was a proximate cause of plaintiff's injuries." *Howard v. UMDNJ*, *supra*, 172 *N.J.* at 549 (citing *Teilhaber v. Greene*, 320 *N.J.Super.* 453, 465 (App. Div. 1999)).

This decision focuses on the first element, namely the physician's duty to provide the patient with the material information that a reasonably prudent patient would want to know before agreeing to the procedure. *Largey v. Rothman*, *supra*, 110 *N.J.* at 211-12. This duty of disclosure is limited to providing medical risks and information, the kind of information the physician, due to his expertise in medicine, is expected to have. "The issue in such cases [informed consent cases] is whether the medical information the physician failed to disclose was material to the patient's decision." *Blazoski v. Cook*, *supra*, 346 N.J. *Super.* at 271. In *Blazoski*, the court held that the defendant doctor had no obligation to inform a patient that pedicle screws used in patient's spine surgery were not approved by FDA for that use, since regulatory status of the screws was not a medical issue. The court wrote that: "[a]ctions for informed consent are limited to the nondisclosure of medical information", *Id.* at 270, and the regulatory status of the device was not "medical information concerning a material risk." *Id.* at 272. The doctor's obligation to provide information for the purposes of informed consent is limited to medical information.

Appendix C

DID DEFENDANT DOCTOR HAVE A DUTY TO TELL PLAINTIFF THAT TERMINATING THE PREGNANCY WOULD END THE LIFE OF A LIVING HUMAN BEING AND DEPRIVE HER OF A RELATIONSHIP WITH AN EXISTING OFFSPRING?

Plaintiff asserts that in order to obtain her informed consent, the doctor should have advised her that by ending her pregnancy she would be terminating the life of a living human being and ending her relationship with an existing offspring. If plaintiff is using the phrase 'living human being' in the general sense that human life is involved in the pregnancy, such a requirement would be unnecessary. Absent a serious cognitive problem, every pregnant woman knows that she is carrying developing human life growing within her and that the abortion will result in the termination of that life. Indeed, it is a matter of common knowledge and any reasonably prudent woman knows that a pregnancy will lead to the birth of a living child absent complications or intervention. A host of scientific and medical experts is not needed to prove these basic facts.

While people may not understand all of the details of human development during pregnancy the way a biologist does, and they may not know all of the proper terminology or the order of development of the parts of the body, it is common knowledge and people understand in a general way that during conception the mother's egg and father's sperm unite and from that union grows a baby starting from a simple mass that grows in complexity until a complete full term baby is formed.

Appendix C

It is undisputed that this plaintiff understood that she was pregnant and that the procedure the defendant was going to perform would end that pregnancy. Having already given birth to two children, she understood that as a pregnant woman she had growing within her the beginnings of a unique human life that would result in a birth of the living child if the pregnancy continued without complications or intervention. In addition, this plaintiff cannot deny that she knew the procedure would end her pregnancy so that a living child would not be born. The very purpose of the procedure was to prevent the birth of a third child.

While she surely understood that at the conclusion of her pregnancy she would have a living child, plaintiff takes the position that prior to the procedure, the doctor should have told her that a unique living human being was already in existence within her. Plaintiff argues that the defendant terminated the life of a living human being and that the unborn child was in fact a living human being in the scientific and biological sense.

If the sole information the plaintiff seeks to have the doctor provide is that the pregnancy involves the growth of unique human life and that without complications or interventions a human child will be born and alive, such a statement would be totally unnecessary. Clearly, that is not the information plaintiff is seeking to have conveyed. By trying to compel doctors to make such a statement, plaintiff is seeking to require the doctors to say something more than the obvious facts we all know to be true. Saying one is terminating the life of a living

human being conjures up quite a different image than saying one is terminating the life of a living human fetus or a living human embryo. Plaintiff's demand that the doctor tell her that an embryo or fetus is a living human being expresses the value laden view that the embryo or fetus is equivalent in all material ways to a person born and alive.

When deciding whether or not terminating a pregnancy is appropriate, different people look at different factors and put different weight on those factors. For example, some look at the stage of development of the fetus or embryo and conclude that at a certain point in the development the fetus or embryo is materially equivalent to a child born and alive and that terminating the pregnancy is not appropriate. For women taking this approach, the stage of development of the fetus is important. Others, like plaintiff, believe that at the point of conception a complete human being is formed materially equivalent to a person born alive. Some people look at the reason the abortion is sought, and may find it appropriate in certain instances such as when the pregnancy resulted from incest or rape. Others consider the health and circumstances of the mother. Some weigh the health or risk of disabilities to a child born from the pregnancy.

The law has long recognized that the question of when life begins and the decision to terminate a pregnancy involve moral, philosophical, and religious questions. Over twenty-five years ago the United States

Appendix C

Supreme Court in *Roe v. Wade*, 410 *U.S.* 113, 116 (1973) wrote:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

On the controversial question of when human life begins, the United States Supreme Court wrote:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.
>
> *Id.* at 159.

More recently in discussing abortion, the United States Supreme Court has continued to recognize the

controversial nature of the topic, stating: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating pregnancy, even in its earliest stage." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 *U.S.* 833, 850 (1992).

Later in the opinion the United States Supreme Court wrote: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851.

When striking down the New Jersey Parental Notification for Abortion Act, the New Jersey Supreme Court stated: "our holding is not based on, nor do we 'presume to answer the profound questions about the moral, medical, and societal implications of abortion.' At the end of the day, those questions are left to the individual to decide for herself." *Planned Parenthood of Central New Jersey v. Farmer*, 165 *N.J.* 609, 613 (2000). (citation omitted). Indeed, the Appellate Division in *Acuna* recognized that "moral, philosophical or religious beliefs may be implicated in a woman's choice." *Acuna, supra*, 354 *N.J. Super.* at 514.

The one bright line the law does recognize is the point of viability. Once the fetus becomes viable the state is viewed as having a sufficient interest in the life of the unborn that it may at that point restrict the woman's right to end the pregnancy, unless necessary to preserve the life and health of the mother. *See Planned*

Appendix C

Parenthood of Southeastern Pennsylvania v. Casey, *supra*, 505 *U.S.* at 879. As the United States Supreme Court stated:

> [T]he concept of viability as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside of the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.
>
> *Id.* at 870.

However, viability is not an issue in this case, since plaintiff was not carrying a viable fetus. Indeed, nothing in this decision should be construed as relieving a physician of any obligation to advise a woman that the fetus is viable.

When plaintiff insists that the doctor should have told her that she would be terminating the life of a living human being, she is asking for more than impartial medical information. She is asking for more than the common knowledge that a pregnant woman is carrying human life and that the pregnancy in the normal course will lead to the birth of a living human being. She is not asking for information on viability, viability is not material to this case. She is asking the doctor to adhere to the point of view that, from the point of conception, an embryo or fetus is in all material respects equivalent to a person born and alive. Such a statement reflects a

value judgment not a medical fact. The doctor's duty of disclosure applies to providing *medical* information. *Blazoski v. Cook*, *supra*, 346 *N.J. Super.* at 270.

To permit this case to proceed to trial would require a Middlesex County jury to consider all of the medical and scientific evidence presented by the plaintiff and defendant and reach a conclusion on whether plaintiff had a human being within her at the time her pregnancy was terminated. The answer to that question turns on the definition of human being and when life begins. As so eloquently stated in the opinions noted above, prior to viability, these are questions the law has left for each woman to decide for herself.

In light of these circumstances, a doctor may not be found liable for failing to advise a patient of plaintiff's personal view on this deeply controversial issue, a view she developed after she terminated her pregnancy. Due to the current state of the law and the lack of consensus on these questions and the fact that more than medical information is implicated by these issues, a doctor is not required to make a statement to a patient considering ending a pregnancy that a non viable fetus or embryo is a living human being in order to obtain that patient's informed consent.

Whether the fetus or embryo is a living human being equivalent in all material respects with a person born and alive is not a medical fact — but presents a moral, philosophical or theological question each woman considering abortion must decide for herself. A doctor

cannot be found negligent for failing to present as medical fact the point of view of one faction in this grave ongoing national debate.

STAGE OF EMBRYONIC OR FETAL DEVELOPMENT

In light of the physician's minimal response to the plaintiff's question whether the baby was "already there," this court has analyzed the motion papers to determine if plaintiff is asserting a claim that the doctor failed to advise her of the stage of development of her embryo and, that if she had the information, she would not have proceeded with the abortion. This inquiry is different from a claim that the doctor should have told her a human being was within her and would be killed as a result of the procedure. Rather this claim would be limited to an assertion that the doctor should have provided her with requested medical or biological information concerning the stage of development of her embryo and that had she had this information she would not have consented to the procedure.

The Appellate Division decision suggests that such a claim may be cognizable under New Jersey law. In its remand describing plaintiff's claim, the Appellate Division wrote: "Here it is the failure on the part of a physician to impart information about the status of the fetus and other information that may have been material to plaintiff in making her choice." *Acuna v. Turkish, supra,* 354 *N.J.Super.* at 517.

In addition, requiring a woman to be advised of the availability of information on the stage of development of the fetus would not impinge on a woman's right to obtain an abortion. The United States Supreme Court has recognized that a state may require a woman to be informed of the probable gestational age of the fetus and the availability of information relating to fetal development without placing an undue burden on the right to seek an abortion before viability. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra*, 505 *U.S.* at 882-883. Accordingly, failure of the physician to provide requested medical or biological information about the stage of the embryo's or fetus' development may give rise to a claim for emotional distress based on lack of informed consent under New Jersey law.

Plaintiff's question, was the baby "already there," is subject to multiple interpretations. She could be asking whether the fetus was viable. The question could be interpreted as asking for the doctor's value judgment on whether the embryo had developed to the point where termination was inappropriate. The question could also be construed as asking whether the pregnancy was so far along that plaintiff would consider a baby to have been formed, and in that context, the question could have initiated a discussion on the stage of development of plaintiff's embryo.

If, indeed, plaintiff was unaware of the stage of development of her embryo and she was asking for that information, to prevail she still must show that the

information was material to her decision. When a patient maintains that a physician failed to advise her of material information, generally the patient must also prove that she, as a reasonable patient, would not have consented to the procedure if that information had been provided. *Teilhaber v. Greene, supra*, 320 *N.J.Super.* at 465. Here, plaintiff's counsel makes a cogent argument that in an abortion case, where the reasons whether or not to have the abortion are uniquely personal to the woman involved, the objective reasonable patient standard does not apply, and the jury merely must determine what this particular plaintiff would have decided given the proper information. As a result, if plaintiff claims that the doctor failed to provide her with information on the stage of the embryo's development, she must also prove that the missing information was material to her decision and that had she known of the embryo's degree of development she would not have terminated the pregnancy.

In the case at hand, plaintiff is not claiming that the stage of development of the fetus was material to her decision. While plaintiff's papers have included statements that the doctor should have advised her on fetal development, those statements are in the context that he should have told her that she was carrying an existing living human being. As plaintiff sets forth in her brief: "the central question of fact for the jury in this case relevant to liability is whether or not a first trimester abortion involves the termination of life of a living human being; and if so, is that fact one which a reasonable and prudent patient, in the position of Mrs. Acuna, would consider relevant to her decision to undergo or forgo the procedure."

Appendix C

This court has not seen in the motion papers, including the proposed amendments to the pleading nor at oral argument, a clear assertion, as a stand-alone claim, that the doctor failed to obtain plaintiff's informed consent because he did not more specifically advise her of the stage of development of her fetus. All of the argument and claims focus on his failure to advise her that she was carrying an existing living human being, a member of her family. There is no assertion that had she known of the degree of development of her embryo she would not have consented to the procedure at that time, but would have consented to it at an earlier point.

In short, this plaintiff is not claiming that information about the stage of development of the fetus at five to seven weeks would have made a difference. Rather after the termination of her pregnancy, plaintiff underwent a seismic shift in her attitude toward abortion based on further reading and reflection. She now takes the position that at the time of conception a living human being came into existence and that to terminate the pregnancy at that point would be killing her child. It is this information that she maintains the doctor should have provided to her, and, as explained earlier, this is not medical information the doctor is obligated to convey.

Appendix C

CONCLUSION

In order to obtain a woman's consent to terminate a pregnancy involving an embryo or fetus that is not viable, a doctor need not advise the woman that by doing so she is ending the life of an existing living human being and a member of her family. Such a statement reflects a philosophical, moral, or theological point of view and is not medical information the doctor must provide. Accordingly, the doctor's failure to provide such a statement to this plaintiff, who was carrying a nonviable five to seven week old embryo, will not support her claim based on lack of informed consent.

No separate claim has been made for failure to provide information on the stage of fetal development nor was the plaintiff's embryo viable. Accordingly, this decision does not decide what obligations a physician has when the fetus is viable or when information on the stage of development of the fetus is requested and is material to the patient's decision.

For all of the reasons set forth above, plaintiff's medical negligence claim for emotional distress caused by the termination of her pregnancy has been dismissed.

APPENDIX D — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED OCTOBER 29, 2002

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

A-2209-01T5

ROSA ACUNA, Administratrix ad Prosequendum of the Estate of MICHAEL DOE (fictitious name of a real individual), deceased infant of ROSA ACUNA, General Administratrix of the Estate of MICHAEL DOE (fictitious name of a real individual), deceased infant of ROSA ACUNA, and ROSA ACUNA, individually,

Plaintiffs-Appellants,

v.

SHELDON C. TURKISH, M.D., OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, a Partnership or P.C. organized under the State of New Jersey, JANET JONES, R.N. (a fictitious name of a real individual),

Defendants-Respondents.

Argued September 17, 2002
Decided October 29, 2002

On Appeal from Superior Court of New Jersey,
Law Division, Middlesex County,
Docket No. L-3812-98.

Appendix D

Before Judges HAVEY, A.A. RODRIGUEZ and PAYNE.

The opinion of the court was delivered by HAVEY, P.J.A.D.

This is a medical malpractice, informed consent case. The gravamen of the complaint, filed by plaintiff Rosa Acuna individually, and in her capacity as Administratrix of the Estate of "Michael Doe," is that defendant Dr. Sheldon C. Turkish (defendant), a medical doctor specializing in the field of obstetrics and gynecology, failed to obtain an informed consent from plaintiff before terminating her pregnancy. Specifically, plaintiff claimed that defendant "failed to inform her that [the fetus, Michael Doe], although a person unborn, was a complete, separate, unique and irreplaceable human being. . . ."

By leave granted, plaintiff appeals from an order for summary judgment dismissing counts one and two of her complaint setting forth a wrongful death cause of action against defendant and his medical group, in which she seeks to recover pecuniary loss "as the result of the death of the child. . . ." Plaintiff also appeals from the dismissal of count five, setting forth a cause of action for her emotional distress suffered as a result of the "loss of her son."

We affirm dismissal of the wrongful death counts. The Wrongful Death Act, *N.J.S.A.* 2A:31-1 to -6, "does not permit recovery attributable to the wrongful death of an infant before birth." *Giardina v. Bennett*, 111 *N.J.*

412, 413, 545 *A.*2d 139 (1988). We reject plaintiff's argument that depriving her of a wrongful death remedy violates the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution.

However, we reverse dismissal of plaintiff's emotional distress claim. In the event plaintiff establishes a medical malpractice claim based on a lack of informed consent, defendant's tortious conduct constitutes a direct tort against plaintiff, entailing emotional distress and mental suffering arising from the loss of a fetus.[1]

I

The evidentiary material considered in a light most favorable to plaintiff, *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 666 *A.*2d 146 (1995), presents the following factual background. On April 6, 1996, plaintiff consulted Dr. Turkish because of abdominal pain. At the time, plaintiff was twenty-nine years of age and had two children, two and one-half years and nine months old, the latter having been delivered by defendant by caesarian section. Defendant examined plaintiff and, and according to plaintiff, advised her that she was pregnant

1. Plaintiff has not appealed from the trial court's dismissal of counts three and four, asserting a survivorship claim. Count six, plaintiff's claim against defendant that he negligently performed the abortion, count eleven, for personal injury to plaintiff against all defendants, and counts seven through ten, against an unidentified nurse, are not the subject of this appeal.

and needed an abortion because "[y]our kidneys are messing you up." Plaintiff interpreted defendant's diagnosis and warnings to mean that, without an abortion, she only had three months to live. In his deposition, defendant testified that he performed a pelvic examination and administered a sonogram, which revealed that the gestational age of the fetus was approximately seven weeks old.

Plaintiff was not concerned how the termination of pregnancy would be performed. Rather, she asked defendant whether "the baby was already there." She testified in her deposition that "[o]bviously I knew I was pregnant, I just needed to know and I wanted to know if the baby was-if there was a baby already in me." By baby, she meant "human being" or "[l]ife in there." According to plaintiff, defendant replied "don't be stupid, it's only blood." Defendant testified he did not remember plaintiff asking that question, but acknowledged that if a patient had asked it, he would have answered that a "seven-week pregnancy is not a living human being."

On April 9, 1996, plaintiff signed a consent form for a termination of pregnancy (TOP), which stated in its entirety, "I hereby give my consent for Dr. Turkish to perform a TOP. He has explained all the risks and complications to me." On April 9, 1996, defendant performed a vacuum aspiration.[2] Defendant admitted that the vacuum aspiration procedure "in fact, kills the

2. According to plaintiff, she is prepared to prove at trial that her "child" was eight weeks old on April 9, 1996.

fetus." However, plaintiff continued to bleed for several weeks and, on May 4, 1996, the bleeding became extremely heavy. She was taken to Robert Wood Johnson Hospital where she was diagnosed with an incomplete abortion. At the hospital, plaintiff underwent a dilatation and curettage (D and C). According to plaintiff, the nurse caring for her explained that the procedure was necessary because "the [previous] doctor [defendant] had left parts of the baby inside of you."

Plaintiff's expert, Theresa Karminski Burke, a psychologist, concluded that, as a result of the termination of pregnancy, plaintiff suffered severe emotional and psychological trauma, which led to the development of acute post-traumatic stress disorder, obsessive compulsive disorder, major clinical depression and psychosexual dysfunction.

In granting summary judgment to defendants dismissing both the wrongful death and emotional distress counts, the trial court viewed the central issue as being whether "a six to eight week fetus is a constitutional person; and the answer is no." Citing *Roe v. Wade*, 410 *U.S.* 113, 93 *S.Ct.* 705, 35 *L.Ed.*2d 147 (1973), the trial court reasoned that, although it sympathized with plaintiff's argument, it "must adhere to the fact that the highest Court of this country has held that a fetus is not a human being under our constitution." Consequently, the wrongful death claim "must be dismissed." Citing *Portee v. Jaffee*, 84 *N.J.* 88, 417 *A.*2d 521 (1980), the court concluded that the fetus' lack of status as a "constitutional person" also precluded

a cause of action by plaintiff for negligent infliction of emotional distress, since that cause of action requires proof of an intimate, familial relationship between plaintiff and an injured "person."

II

WRONGFUL DEATH CLAIMS

Plaintiff first argues that the trial court erred in dismissing her wrongful death claims under counts one and two.

The Wrongful Death Act provides in *N.J.S.A.* 2A:31-1:

> When the death of a *person* is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the *person* injured and although the death was caused under circumstances amounting in law to a crime.
>
> [Emphasis added.]

Plaintiff acknowledges that the Supreme Court in *Giardina, supra*, 111 *N.J.* at 413, 545 *A.*2d 139, held that

the Act "does not permit recovery attributable to the wrongful death of an infant before birth." The Court so held after reviewing the legislative history of the Act. It observed:

> The distinctive statutory nature of this derivative cause of action, the historical origins of this statute and the subsequent history and evolution of the Wrongful Death Act in this state suggest that the traditional definition of "person" under the Act be retained. We are persuaded ultimately because we find no compelling underlying policy that would impel us to give the statutory term "person" an expansive interpretation here.

[*Id.* at 427, 545 *A*.2d 139.]

Nevertheless, plaintiff challenges the constitutionality of the Act as applied in *Giardina*. She argues that denying her recovery under the Act, "in light of the fact that she can prove every element of the claim and [that] she sustained exactly the same loss as mothers who are allowed recovery," violates her Equal Protection Rights under the Fourteenth Amendment of the United States Constitution. She observes that, under *Giardina*, "[i]f a child is injured in utero, at any age of gestation, but lives but for a moment outside the mother, Wrongful Death damages may be recovered. If the same child, at the same age, is injured in utero by the same tortious act, but his death ensues in the mother's body, the mother may not recover these damages." She reasons that this

distinction is irrational because a mother's entitlement to wrongful death damages should "not depend on where her child happened to be at the time the death ensued. . . ." Plaintiff adds that this "irrational" distinction frustrates the Wrongful Death Act's purpose of protecting *all mothers*, as well as the sanctity of life.

A similar argument was presented to and rejected by the Third Circuit in *Alexander v. Whitman*, 114 *F.*3d 1392, 1400 (3rd Cir.), *cert. denied*, 522 *U.S.* 949, 118 *S.Ct.* 367, 139 *L.Ed.*2d 286 (1997). There, the court determined that a mother "can only establish a [wrongful death] claim on behalf of her child . . . if her child . . . fall(s) within the protections afforded 'person [s]' as that term is used in the Fourteenth Amendment, and it is clear that it does not." *Id.* at 1400 (citing *Roe v. Wade*, *supra*, 410 *U.S.* at 158, 93 *S.Ct.* at 729, 35 *L.Ed.*2d at 180, holding that the word "person" as used in the Fourteenth Amendment does not include the unborn). The court added that the fact that plaintiff's pleadings and expected proofs support the conclusion that a fetus was a "human being" did not alter the legally established definition of "persons" under the Fourteenth Amendment. *Alexander*, *supra*, 114 *F.*3d at 1401.

Plaintiff dismisses the holdings in *Roe* and *Alexander* on the basis that she does not challenge the statutory classification of pre-birth fetus and born children. Rather, she seeks equal protection for herself as a mother, a member of a constitutionally protected class, who has the same relationship with her fetus as mothers who give birth to live babies. She adds that

because the Wrongful Death Act implicates a mother's fundamental interest in her relationship with her child, the "strict scrutiny" standard applies, and thus only a compelling state interest can justify the distinction made by the *Giardina* Court.

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend XIV, § 1. This protection has been explained as follows:

> The equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed.
>
> [*Washington Nat'l Ins. Co. v. Board of Review*, 1 *N.J.* 545, 553, 64 *A.*2d 443 (1949).]

The equal protection guarantee applies to the decisions of the courts as well as to the acts of the Legislature. *Jersey Shore Med. Center-Fitkin Hosp. v. Baum's Estate*, 84 *N.J.* 137, 145, 417 *A.*2d 1003 (1980). Also, " '[f]ederal equal-protection analysis employs different tiers of review: strict scrutiny when an act involves a fundamental right or a suspect class; intermediate scrutiny when an act involves a semi-suspect class; and

minimal rational-basis scrutiny in all other cases.' " *McCann v. Clerk, City of Jersey City*, 167 *N.J.* 311, 325, 771 *A.*2d 1123 (2001) (quoting *Drew Assocs. v. Travisano*, 122 *N.J.* 249, 258, 584 *A.*2d 807 (1991)).

In support of application of the strict scrutiny test, plaintiff relies on the United States Supreme Court's decisions in *Levy v. Louisiana*, 391 *U.S.* 68, 88 *S.Ct.* 1509, 20 *L.Ed.*2d 436 (1968); *Glona v. American Guar. & Liab. Ins. Co.*, 391 *U.S.* 73, 88 *S.Ct.* 1515, 20 *L.Ed.*2d 441 (1968); and *Weber v. Aetna Cas. & Sur. Co.*, 406 *U.S.* 164, 92 *S.Ct.* 1400, 31 *L.Ed.*2d 768 (1972). In *Levy*, the Court declared unconstitutional on equal protection grounds a Louisiana statute denying illegitimate children the right to maintain an action for their mother's wrongful death. 391 *U.S.* at 71, 88 *S.Ct.* at 1511, 20 *L.Ed.*2d at 439. In *Glona*, the Court held that Louisiana violated the Equal Protection Clause by denying statutory recovery by surviving mothers for the wrongful death of illegitimate children. 391 *U.S.* at 75, 88 *S.Ct.* at 1516, 20 *L.Ed.*2d at 443. Finally, in *Weber*, the Court held that a Louisiana workmen's compensation statute that denied wrongful death benefits to a dependent, unacknowledged illegitimate child that were provided to legitimate and to acknowledged illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment. 406 *U.S.* at 173-76, 92 *S.Ct.* at 1405-07, 31 *L.Ed.*2d at 779.

Contrary to plaintiff's argument, the cited cases applied the "rational basis," rather than the "strict scrutiny" test. *See e.g.*, *Levy*, *supra*, 391 *U.S.* at 71, 88 *S.Ct.* at 1511, 20 *L.Ed.*2d at 439 ("[t]hough the test has

been variously stated, the end result is whether the line drawn is a rational one"). Although *Levy* observed that "[t]he rights asserted here involve the intimate, familial relationship between a child and his own mother," the Court's holding is based on irrational classification, not interference with that relationship. *Ibid.* "When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate?" *Ibid.* In each case, no rational basis for the statutory distinction was present, and no state interest in legitimate family relations was being served. *Weber, supra,* 406 *U.S.* at 175, 92 *S.Ct.* at 1406, 31 *L.Ed.*2d at 778-79; *Glona, supra,* 391 *U.S.* at 75, 88 *S.Ct.* at 1516, 20 *L.Ed.*2d at 443.

Here, as well, we find no fundamental rights implicated by *Giardina's* holding that the Wrongful Death Act does not permit recovery attributable to the wrongful death of a fetus. Plaintiff is correct that a woman may have a fundamental right to a relationship with her child. *See In re Baby M,* 109 *N.J.* 396, 447, 537 *A.*2d 1227 (1988) ("the rights of personal intimacy, of marriage, of sex, of family, of procreation . . . are fundamental rights protected by both the federal and state Constitutions"). However, plaintiff's premise is contradicted by the terms of the Wrongful Death Act itself. Nothing in the Act attempts to classify mothers, or give them special status based on whether or not they are pregnant, nor does the statute, on its face, focus on any special familial relationship or even the sanctity of life.

Appendix D

Moreover, as applied by *Giardina*, nothing in the Act interferes with a mother's relationship with her fetus. Whether or not a mother's relationship with her unborn child is a fundamental right is not dispositive because the Act does not affect plaintiff's "relationship" with her unborn child. As the *Alexander* court observed, "[a] mother's relationship with her fetus is exactly the same whether or not she can bring a wrongful death or survivor action. It is not the relationship that is affected here, it is the ability to recover for the loss of that relationship." *Alexander, supra*, 114 *F.*3d at 1404. It is difficult to imagine, for example, that a mother would consider the availability or nonavailability of a wrongful death remedy in making her choice whether or not to terminate her pregnancy in the informed consent context. *See ibid.* ("[i]t is impossible for us to imagine that any such decision [the mother made or might have made about her stillborn child] would be the least bit influenced by whether or not a mother could bring a wrongful death or survival action to recover damages for the loss of a fetus").

Absent a fundamental right, suspect class or semi-suspect class, we do not hesitate to apply the rational basis test in this case. The question is whether the challenged statute is supported by any "conceivable rational basis." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 563, 494 *A.*2d 294 (1985). "The equal protection guarantee is offended only if the classification is wholly unrelated to the legislative objective." *In re Regulation of Operator Serv. Providers*, 343 *N.J.Super.* 282, 324, 778 *A.*2d 546 (App.Div.2001). In applying that standard, we find no

indiscriminate classification. " 'The fundamental purpose of the wrongful death action is to compensate survivors for the pecuniary losses they suffer because of the tortious conduct of others.' " *Smith v. Whitaker*, 160 *N.J.* 221, 231, 734 *A.*2d 243 (1999) (quoting *Alexander*, *supra*, 114 *F.*3d at 1398); *see also LaFage v. Jani*, 166 *N.J.* 412, 430, 766 *A.*2d 1066 (2001) ("our Wrongful Death Act is remedial in nature and is designed 'to compensate surviving dependents for the pecuniary losses resulting from the death' of, in many cases, the 'breadwinner' "; quoting *Kibble v. Weeks Dredging & Constr. Co.*, 161 *N.J.* 178, 189, 735 *A.*2d 1142 (1999)). Simply stated, the Act focuses on dependency and pecuniary loss. As such, its classifications are rationally related to its purpose. *See N.J.S.A.* 2A:31-4 ("[t]he amount recovered . . . shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same. If any of the persons so entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury").

Moreover, *Giardina's* application of the Act does not leave an aggrieved mother without a remedy. The Court accommodates th rights of parents by recognizing a common law cause of action to recover for emotional distress and mental anguish arising from the death of an infant before birth. *See infra* at III. The Court's determination that no cause of action under the Wrongful Death Act existed was based not only on its perception

that a fetus was not intended to be included as a "person" under the statute, but also that, to modify the statute to include a fetus in the term "person," was "unnecessary in light of the concomitant common-law right we determine to exist" in a parent to recover for emotional distress arising out of the death of an unborn fetus. *Giardina, supra,* 111 *N.J.* at 428, 545 *A.*2d 139. Plaintiff's constitutional challenge to the Wrongful Death Act is therefore rejected.

III

EMOTIONAL DISTRESS CLAIM

Plaintiff's emotional distress claim is founded on the proposition that defendant "terminated the life" of plaintiff's "child" under circumstances where he denied plaintiff the ability to make an informed decision whether or not to consent to the procedure. She argues that defendant failed to tell her a material fact; "that a reasonable and prudent patient in [plaintiff's] circumstance would want to know whether the proposed procedure would terminate the life of an existing human being." The trial court concluded that there were fact issues concerning the informed consent issue, but, as noted, dismissed the claim on the ground that the fetus was not a "constitutional person."

A physician's duty of disclosure in the typical malpractice case is measured by the "prudent patient" or "materiality of risk" standard. *Largey v. Rothman,* 110 *N.J.* 204, 212-13, 540 *A.*2d 504 (1988); *Blazoski v.*

Cook, 346 *N.J.Super.* 256, 267, 787 *A.*2d 910 (App.Div.), *certif. denied*, 172 *N.J.* 181, 796 *A.*2d 897 (2002). The standard relates to the patient's needs, not the physician's judgment. *Niemiera v. Schneider*, 114 *N.J.* 550, 565 n. 4, 555 *A.*2d 1112 (1989). "[A] physician must disclose to a patient all material information that a 'prudent patient' might find significant for a determination whether to undergo the proposed [medical procedure]." *Id.* at 562, 555 *A.*2d 1112. This standard is objective. *Largey, supra*, 110 *N.J.* at 211, 540 *A.*2d 504. "The test for determining whether a particular risk must be disclosed is its materiality to the patient's decision, *i.e.*, all risks potentially affecting the decision must be divulged." *Blazoski, supra*, 346 *N.J.Super.* at 268, 787 *A.*2d 910 (citing *Largey, supra*, 110 *N.J.* at 211-12, 540 *A.*2d 504). Aside from establishing that the physician failed to comply with this applicable standard of disclosure, a plaintiff must also establish proximate cause. *Largey, supra*, 110 *N.J.* at 215, 540 *A.*2d 504; *see also Howard v. University of Med. & Dentistry of N.J.*, 172 *N.J.* 537, 559, 800 *A.*2d 73 (2002) (a plaintiff must "show a causal connection between the inadequately disclosed risk of the procedure and the injury sustained"). Plaintiff must demonstrate that a prudent person under her circumstances would not have consented and submitted to the medical procedure had she been properly informed. *Teilhaber v. Greene*, 320 *N.J.Super.* 453, 465, 727 *A.*2d 518 (App.Div.1999). Thus, the issue of causation is also governed by an objective standard. *Largey*, 110 *N.J.* at 215-16, 540 *A.*2d 504.

Applying these principles in the context of a termination of pregnancy context raises difficult questions because moral, philosophical or religious beliefs may be implicated in a woman's choice. Therefore, during oral argument before us, both parties have agreed that it is premature to define what duty of care is owed by a physician in this context. The parties also rightly agree that we should not, at this posture of the case, address the fact-sensitive issues concerning what dangers incident to, or consequences resulting from, such a procedure would be "material" to the "prudent patient." Both parties concur that resolution of these issues should await a complete factual record. Therefore, we do not address these perplexing issues. Consequently, solely for the purpose of addressing the narrow issue before us, we will assume that defendant owed a duty to plaintiff to disclose all material information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy. We also assume that defendant breached that duty, and the breach was a proximate cause of plaintiff's choice to undergo the procedure.

We conclude that the trial court erred in dismissing her emotional distress claim on the basis that a fetus is not a "constitutional person." *Roe* indeed held that the word "person" as used in the Fourteenth Amendment does not include the "unborn." *Roe*, *supra*, 410 *U.S.* at 158, 93 *S.Ct.* at 729, 35 *L.Ed.*2d at 180. However, *Roe* involved a woman's privacy right, derived from the Due Process Clause of the Fourteenth Amendment's "concept of personal liberty and restrictions upon state

action. . . ." 410 *U.S.* at 153, 93 *S.Ct.* at 727, 35 *L.Ed.*2d at 177. The issue in *Roe* was whether that privacy right is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Ibid.* The Court held that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." 410 *U.S.* at 154, 93 *S.Ct.* at 727, 35 *L.Ed.*2d at 177-78.

Roe is not dispositive here because this is not a case implicating a government's attempt to limit a woman's privacy right to terminate a pregnancy. Crediting plaintiff's proofs, it is about a woman who claims severe emotional distress caused by medical advice resulting in her grudging *consent* to terminate a pregnancy, purportedly given because of defendant's failure to advise her of the material consequences of the procedure. The fact that a fetus may not be a "person" under the Fourteenth Amendment is irrelevant because plaintiff's claim is not dependent upon whether or not the fetus enjoys a constitutional status as a "person." The claimed malpractice committed by defendant was directed against plaintiff as an expectant mother and thus was a direct, not a derivative claim. *See Giardina, supra,* 111 *N.J.* at 413, 545 *A.*2d 139 ("the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury . . .").

In our view, plaintiff's emotional distress claim is well-founded under New Jersey law. The claim of emotional distress in this context has evolved by

recognition of the intimate familial relationship between the claimant and the immediate victim, *Giardina, supra*, 111 *N.J.* at 417, 545 *A.*2d 139, and "the foreseeability of parental suffering. . . ." *Ibid.*

For example, in *Portee, supra*, the Court recognized a common-law cause of action for negligent infliction of emotional distress in a "bystander" case, where plaintiff established the following elements: "(1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." 84 *N.J.* at 101, 417 *A.*2d 521. In the so-called wrongful birth cases, the Court held in *Berman v. Allan*, 80 *N.J.* 421, 439, 404 *A.*2d 8 (1979), that a defendant's failure to advise a pregnant woman of the availability of amniocentesis permits recovery by the parents for their mental and emotional injury on account of their child being born with congenital defects. Similarly, in *Schroeder v. Perkel*, 87 *N.J.* 53, 63-64, 432 *A.*2d 834 (1981), the Court held that an emotional distress claim of parents was cognizable for defendant's negligent genetic counseling, which deprived the parents of the opportunity of considering the wisdom of having another child.

In *Giardina, supra*, 111 *N.J.* at 420, 545 *A.*2d 139, the Court extended the emotional distress cause of action to parents of a stillborr infant. It concluded that "the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct

infliction of injury, their emotional distress and mental suffering, for which they are entitled to recover compensatory damages." *Id.* at 413, 545 *A*.2d 139. It explained, "[b]y recognizing such a cause of action we protect the interests affected by the tortious conduct resulting in the death of an infant before birth." *Ibid.* The Court added:

> Medical malpractice causing a stillbirth results in infliction of a direct injury to the mother as well as to her unborn child. Even without any permanent physical harm, the mother suffers severe and genuine injuries in the form of emotional distress and mental anguish occasioned by her baby's stillbirth. This suffering is experienced, also, by the father of the infant. Thus, in a case such as this, the injury suffered by the mother and father on the stillbirth of their eagerly expected first child is palpable and predictable.
>
> [*Id.* at 415, 545 *A*.2d 139.]

We are satisfied that the *Giardina* cause of action should be available to plaintiff. It is, of course, true that in this case, unlike *Giardina*, there was no "birth" at all. Thus, defendant argues, *Giardina's* cause of action in the present context is not available because there was no expectation of birth of a healthy child and no birth process at all. Defendant reasons that without these facts, the claim for negligent infliction of emotional

distress is constitutionally precluded because it is not a direct claim by plaintiff, but like a wrongful death claim, wholly derivative. We reject the argument. First, as stated, the cause of action for emotional distress set forth in *Giardina* is not derivative, but direct. *See* 111 *N.J.* at 413, 545 *A.*2d 139.

Second, the thrust of plaintiff's claim is that there was no expectation of birth of a healthy child and no birth process because of defendant's tortious conduct. In other words, she was deprived of these intimate experiences because she was not informed of the material consequences of the procedure. In *Giardina*, it was negligent treatment. Here, it is the failure on the part of a physician to impart information about the status of the fetus and other information that may have been material to plaintiff in making her choice. There is no logical basis to distinguish the cases simply because the tortious conduct of the defendants differed, or that the fetus in this case did not survive full term.

Defendant further argues that the "death" of a fetus as a result of a termination of pregnancy should not be treated as akin to a stillbirth because, unlike a stillbirth, it is the desired outcome. This argument, of course, begs the question. Whether the termination was the "desired outcome" is a fact-based issue. Defendant's argument wrongly presumes the failure of plaintiff's proffered proof that her consent to the termination of pregnancy was not informed.

Appendix D

We deem plaintiff's emotional distress cause of action as a logical complement to the "wrongful birth" cases, which involve a "violation of the interest in self-determination," and which focus on "the parents' lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects." *Canesi v. Wilson*, 158 *N.J.* 490, 501-02, 730 *A.*2d 805 (1999) (citing *Schroeder, supra*, 87 *N.J.* at 66, 432 *A.*2d 834; *Berman, supra*, 80 *N.J.* 421, 404 *A.*2d 8, and *Procanik v. Cillo*, 97 *N.J.* 339, 478 *A.*2d 755 (1984)). "[A] woman's right to determine for herself whether or not to continue or terminate her pregnancy . . . protects a distinctively personal interest." *Canesi, supra*, 158 *N.J.* at 501, 730 *A.*2d 805. The "distinctively personal interest" to choose not to give birth to a baby has a logical corollary; a distinctively personal interest, based on a woman's circumstances and discrete moral and religious beliefs, to choose *not* to terminate the pregnancy after being informed by her physician regarding the status of the fetus and all other facts that may be deemed material in making that choice. The wrongful birth of a baby with a congenital defect may obviously give rise to profound mental anguish. Based on the circumstances, background and beliefs of a mother, inducing her to terminate the pregnancy, even at eight weeks, because of the physician's failure to obtain an informed consent may also result in severe distress and mental anguish. *See Willis v. Ashby*, 353 *N.J.Super.* 104, 112, 801 *A.*2d 442 (App.Div.2002) (quoting James R. Woods, Jr., M.D. and Jenifer L. Esposito Woods, M.B.A., *Loss During Pregnancy or in the New Born Period: Principles of Care with Clinical Cases and Analyses* 5 (Jannetti 1997))

(" '[t]he vast majority of people respond to pregnancy loss, *regardless of gestational age*, as the death of a baby and the subsequent death of their hopes and dreams' "; emphasis added). Plaintiff, of course, is left to her proofs on this point. We reverse dismissal of plaintiff's emotional distress claim and remand for further proceedings.

Affirmed in part; reversed in part and remanded for further proceedings.

APPENDIX E — ORDER FOR PARTIAL SUMMARY JUDGMENT AS TO THE FIRST, SECOND, THIRD, FOURTH AND FIFTH COUNTS OF THE AMENDED COMPLAINT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY FILED JUNE 6, 2001

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. MID-L-3812-98

CIVIL ACTION

ROSA ACUNA Administratrix ad Prosequendum of the Estate of MICHAEL DOE (fictitious name of a real individual), deceased infant of ROSA ACUNA, General Administratrix of the Estate of MICHAEL DOE, (fictitious name of a real individual), deceased infant of ROSA ACUNA, and ROSA ACUNA, individually,

Plaintiff(s),

v.

SHELDON C. TURKISH, M.D., OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY — EDISON, a Partnership or P.C. organized under the State of New Jersey JANET JONES, R.N. (a fictitious name of a real individual),

Defendant(s).

Appendix E

ORDER FOR PARTIAL SUMMARY JUDGMENT AS TO THE FIRST, SECOND, THIRD, FOURTH AND FIFTH COUNTS OF THE AMENDED COMPLAINT

This matter having been opened to the Court by Kalison, McBride Jackson & Murphy, attorneys for defendants, Sheldon C. Turkish, M.D., and Obstetrical and Gynecological Group of Perth Amboy-Edison, on a motion for Partial Summary Judgment and the Court having considered the papers submitted, and any arguments of counsel, and for good and sufficient cause shown;

IT IS ON this 6th day of June, 2001

ORDERED that Summary Judgment be and hereby is entered in favor of the defendants pursuant to N.J.S.A. 2A:62A-1 as to the First, Second, Third, Fourth and Fifth Counts of the Second Amended Complaint; and it is

FURTHER ORDERED that all causes of action as to plaintiff "Michael Doe" in the Second Amended Complaint be and hereby are dismissed.

s/ Doug Hague
Doug Hague, J.S.C.

APPENDIX F — LETTER OPINION OF THE SUPERIOR COURT OF NEW JERSEY DATED MAY 1, 2001

SUPERIOR COURT OF NEW JERSEY

May 1, 2001

Cassidy Messina & Laffey
961 Holmdel Road
Holmdel, NJ 07733-2103
Attn: Harold Cassidy, Esq.

Kalison McBride Jackson & Murphy, P.A.
Liberty Corner Executive Center
645 Martinsville Road
PO Box 814
Liberty Corner, NJ 07938
Attn: John Zen Jackson, Esq.

Letter Opinion

Re: Acuna v. Turkish
MID-L-3812-98

Dear Counsel:

Defendant, Sheldon Turkish, M.D., filed a motion for partial summary judgment returnable on March 30, 2001. On March 22, 2001, this Court heard oral argument and reserved judgment. Today, this Court grants Defendant's motion for partial summary judgment.

Appendix F

This action arises from an abortion procedure performed by Defendant at his office on Plaintiff on April 9, 1996. It is undisputed that on April 6, 1996, Plaintiff underwent an ultrasound which revealed that she was pregnant. After having read and signed a consent form, Plaintiff decided to have an abortion. Defendant then performed the procedure on April 9, 1996.

On May 5, 1996, Plaintiff developed bleeding and sought medical care at the Robert Wood Johnson University Hospital. Plaintiff underwent a dilatation and curettage. A pathology report states that the procedure yielded no fetal parts, only chorionic villi and decidua.

While in the ER, a nurse allegedly made a statement to Plaintiff that part of her baby had been left in her. Plaintiff further claims that Dr. Turkish told her prior to the abortion that there was no baby; consequently, Plaintiff had difficulty reconciling the two statements. Plaintiff then began researching the subject and claims that after concluding her research, she discovered that she really was pregnant with a baby, not simply a mass of tissue or blood.

The issue for purposes of this motion is whether a six to eight week fetus is considered a person under the laws of this state for purposes of maintaining causes of action for wrongful death, survival, and negligent infliction of emotional distress. The Supreme Court of the United States has consistently adhered to the holding of *Roe v. Wade*, 410 U.S. 113 (1973), that *the unborn are not persons under* 14th Amendment. *See Planned*

Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992); *see also Roe v. Wade.* In *Alexander v. Whitman*, 114 F.3d 1392 (1997), the Third Circuit Court of Appeals stated that "the issue is not whether the unborn are *human beings but whether* they are constitutional persons." *Id.* at 1402.

In the case at bar, Plaintiff introduces extensive medical evidence to prove that a fetus is a human being. *However*, that is not the issue. The issue is whether a six to eight week fetus *is a constitutional person; and the answer is no. So, although this Court sympathizes with* Plaintiff's argument and effort, *this* Court must adhere *to the* fact that the highest Court of this *country has held that a fetus is not a human* being under our constitution. As such, the claims for wrongful death, survival, and negligent infliction of emotional distress cannot survive and must be dismissed because no constitutional person existed to maintain these causes of action.

Under this state's Wrongful Death Statute, the Court in *Giardina v. Bennett*, 111 N.J. 412 (1988), held that in enacting the Wrongful Death Statute, "the Legislature . . . never intended to create a derivative action in favor of the survivors of a fetus never born alive and that in the contemporary setting the legislative purpose will not be frustrated by adherence to this original and continuing understanding." *Id.* at 428. For a survival claim, the Court in *Alexander* held that "it is clear by the implications of the holding in *Giardina* and by the language of the survival action statute itself that the New

Jersey Legislature did not intend to provide the parents of unborn or stillborn fetuses with a statutory cause of action for survival." *Alexander*, 114 F.3d at 1399. As such, *Giardina* and *Alexander* are consistent with the holding in *Roe*. Therefore, Plaintiff cannot sustain causes of action for wrongful death or survival.

Finally *a cause of action* for "negligent infliction of emotional distress requires proof of the following elements: (1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." *Porter v. Jaffee*, 84 NJ. 88, 101 (1980). *Here, there is no injury* to another because a fetus is *not a constitutional* person. Subsequently, the cause of action for negligent infliction of emotional distress also fails and must be dismissed.

Therefore, it is the ruling of this Court that the Defendant's motion for partial summary judgment is GRANTED. If the Plaintiff decides to file an interlocutory appeal, then this matter shall be stayed for 60 pending resolution of that appeal. The Defendant shall submit an order in accordance with this ruling.

Very truly yours,

s/ Doug Hague
DOUG HAGUE, J.S.C.

APPENDIX G — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED NOVEMBER 20, 2007

SUPREME COURT OF NEW JERSEY
M-395 September Term 2007
59,525

ROSA ACUNA, etc., et al.,

Plaintiffs-Movants,

v.

SHELDON C. TURKISH, M.D., etc., et al.,

Defendants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the opinion in A-15-06 is denied.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 16th day of November, 2007.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

OPPOSITION BRIEF

100

(4)

No. 07-1328

FILED
JUL 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ROSA ACUNA,

Petitioner,

v.

SHELDON C. TURKISH, M.D. and
OBSTETRICAL andGYNECOLOGICAL GROUP
OF PERTH AMBOY-EDISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

JOHN ZEN JACKSON
Counsel of Record
LEONARDO M. TAMBURELLO
KALISON, MCBRIDE, JACKSON
& MURPHY, P.C.
25 Independence Boulevard
Warren, New Jersey 07059
(908) 647-4600

Counsel for Respondents

217038

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2008) to consider the decision of the Supreme Court of New Jersey reported at 930 A.2d 416, which is based solely on state common law.

2. Whether the decision below conflicts with the federal Constitution or with decisions of this Court and of the Court of Appeals for the Third Circuit.

PARTIES TO THE PROCEEDING

Petitioner, Rosa Acuna, is an individual and a resident of the State of New Jersey.

Respondent Sheldon C. Turkish is an individual licensed to practice medicine in the State of New Jersey. Respondent Obstetrical and Gynecological Group of Perth Amboy-Edison, P.C. is a professional corporation of the State of New Jersey.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Obstetrical and Gynecological Group of Perth Amboy-Edison does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Citations to the Opinions Below	1
Counterstatement of Jurisdiction	1
Counterstatement of Constitutional & Statutory Provisions	1
Counterstatement of the Case	2
Reasons for Denying the Petition	5
I. This Court Lacks Jurisdiction To Consider This Matter, As the Decision Below Presents No Federal Question Which Was Passed Upon and Rests On State Law Grounds that Are Independent of the Alleged Federal Question and Adequate to Support the Judgment	7

Contents

Page

II. This Court Should Also Decline Jurisdiction Because the Alleged Federal Question Is Neither "Important" Nor "Substantial" and Does Not Conflict With the Federal Constitution or With the Decisions of this Court or of the Courts of Appeals. 14

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) 20

Alexander v. Whitman, 114 F.3d 1392 (3d Cir.), *cert. denied*, 522 U.S. 949 (1997) 6, 16, 17, 18

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 14

Berry v. Mississippi, 128 S.Ct. 528 (2007) 9

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 21

Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) 11

Cardinale v. Louisiana, 394 U.S. 437 (1969 9

Coleman v. Thompson, 501 U.S. 722 (1991) 9, 14

Crowell v. Randell, 35 U.S. 368 (1836) 9

Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308 (1902) 15

Cited Authorities

Page

Gonzales v. Carhart,
127 S. Ct. 1610 (2007) 15, 24

Gonzales v. Raich,
545 U.S. 1 (2005) 21

Hodges v. Snyder,
261 U.S. 600 (1923) 15

Marie v. McGreevey, 314 F.3d 136 (3d Cir. 2002),
cert. denied, 539 U.S. 910 (2003) 6, 17, 18

Michigan v. Long,
463 U.S. 1032 (1983) 9

Planned Parenthood v. Rounds,
2008 U.S. App. LEXIS 13564
(8th Cir. June 27, 2008) 18, 19, 20

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992) ..... *passim*

Roe v. Wade,
410 U.S. 133 (1973) 6, 21, 24

Cited Authorities

Page

STATE CASES

Acuna v. Turkish, Docket No. MID-L-3812-98 (N.J. Super. Ct. Law Div. May 1, 2001) 1

Acuna v. Turkish ("*Acuna I*"), 808 A.2d 149 (N.J. Super. Ct. App. Div. 2002) ..... *passim*

Acuna v. Turkish ("*Acuna II*"), 894 A.2d 1208 (N.J. Super. Ct. App. Div. 2006), *appeal dismissed*, 915 A.2d 1045 (N.J. 2007), *cert. denied*, 128 S. Ct. 181 (2007) ..... *passim*

Acuna v. Turkish ("*Acuna III*"), 930 A.2d 416 (N.J. 2007) ..... *passim*

Blazoski v. Cook, 787 A.2d 910 (N.J. Super. Ct. App. Div.), *certif. denied*, 796 A.2d 181 (N.J. 2002) 13, 22, 23

Giardina v. Bennett, 545 A.2d 139 (N.J. 1988) 8, 17

Largey v. Rothman, 540 A.2d 504 (N.J. 1988) ..... *passim*

Howard v. Univ. of Med. and Dentistry of N.J., 800 A.2d 73 (N.J. 2002) 11, 12, 13

Cited Authorities

Page

OTHER CASES

Slater & Baker v. Stapleton,
95 Eng. Rep. 860 (K.B. 1767) 11

FEDERAL STATUTES

28 U.S.C. § 1257 (2008) 1, 6, 7, 9

STATE STATUTES

S.D. Codified Laws § 34-23A-1(4) (2008) 19

S.D. Codified Laws § 34-23A-10.1(1)(b) (2008) 19

S.D. Codified Laws § 34-23A-10.1(1)(c) (2008) 19

S.D. Codified Laws § 34-23A-10.1(1)(d) (2008) 19

COURT RULES

Sup. Ct. R. 10 6

Sup. Ct. R. 10(b) 15

Sup. Ct. R. 10(c) 15

Sup. Ct. R. 14(1)(g)(i) 7, 8

Cited Authorities

Page

LEGISLATIVE MATERIALS

Assemb. B. 1405, 211th Leg., 2004-05 Sess. (N.J. 2004) 21

Assemb. B. 2275, 209th Leg., 2000-01 Sess. (N.J. 2000) 21

S.B. 811, 208 Leg., 1998-1999 Sess. (N.J. 1998) 21

OTHER AUTHORITIES

Green, *Determining Moral Status*, 2 Am. J. Bioethics 20 (2002) 22

Post, *Informed Consent To Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939 (2007) 22, 23

CITATIONS TO THE OPINIONS BELOW

Acuna v. Turkish, Docket No. MID-L-3812-98 (N.J. Super. Ct. Law Div. dated May 1, 2001) (granting partial summary judgment to Respondents, *inter alia*, dismissing Petitioner's wrongful death, survivor claims and emotional distress claims against Respondents), *aff'd in part and rev'd in part*, 808 A.2d 149 (N.J. Super. Ct. App. Div. 2002) (affirming dismissal of Petitioner's wrongful death claims, reversed and remanded as to emotional distress damage claims) ("*Acuna I*"), *on subsequent appeal following remand*, 894 A.2d 1208 (N.J. Super. Ct. App. Div. 2006) (reversing trial court's dismissal of negligence claims) ("*Acuna II*"), 930 A.2d 416, (N.J. 2007) (reinstating dismissal of remaining claims) ("*Acuna III*") and *appeal dismissed*, 915 A.2d 1045 (N.J. 2007) (as to wrongful death claims) and *cert. denied*, 128 S. Ct. 181 (2007) (as to wrongful death claims).

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257 to review the decision of the New Jersey Supreme Court because it rests entirely on state common law grounds.

COUNTERSTATEMENT OF CONSTITUTIONAL & STATUTORY PROVISIONS

The decision below rests solely on state common law, and does not rest on any federal constitutional or statutory provisions.

COUNTERSTATEMENT OF THE CASE

Petitioner, Rosa Acuna ("Petitioner" or "Acuna") is a woman who grew up in the New Jersey and New York City area and who, at the time of her deposition, had two children. She attended high school for four years, but did not graduate. (Pa555-56, 575, 634.)

On December 31, 1991, Acuna became a patient of Respondent Dr. Turkish's medical practice. (Pa579.) On October 21, 1993, Petitioner gave birth to her first child. (Pa575.) Her second child was born on June 21, 1995. (Pa634.)

At the latest, by the time of her first pregnancy in 1993, Acuna knew that being pregnant meant that, barring a miscarriage or an abortion, eventually she was going to have a baby and, in the course of being pregnant, an embryo and then fetus would form in her uterus. (Pa566 – Pa568.)

On April 6, 1996, Acuna went to Dr. Turkish's office. She reported a last menstrual period (LMP) of February 21, 1996. (Pa612.) During this visit, Dr. Turkish performed a physical examination which revealed a pregnancy estimated at seven or eight weeks of gestation post-LMP, (*i.e.*, from the first day of Petitioner's last menstrual period said to be February 21). (Pa611-Pa612.) An ultrasound confirmed a pregnancy or seven weeks from LMP. (Pa607.) Calculations of pregnancy in terms of LMP are two weeks longer than calculations of the pregnancy from the time of conception. (Pa648-Pa649.) Thus, as of April 6, 1996, the pregnancy was seven weeks LMP and five

weeks post-conception. *Id.* Dr. Turkish spoke with Petitioner regarding her condition and treatment, including a discussion of a procedure for the termination of the pregnancy. (Pa603.) Dr. Turkish told Acuna to go home and think about whether she wanted to terminate the pregnancy. (Pa604.)

Three days later, on April 9, 1996, Acuna came back to Dr. Turkish's office for the procedure to terminate her pregnancy. (Pa589.) At that time, she signed a document giving her consent to the termination of her pregnancy. (Pa590-Pa591; Pa594.) At the time of the procedure, Rosa Acuna was 29 years old. (Pa552.)

Thereafter, on April 8, 1998, Petitioner filed a multi-count complaint against Respondents alleging wrongful death (counts one and two), survivor claims (counts three and four), emotional distress (count five), medical malpractice / negligence (count six) and personal injury (count eleven). Other parts of the complaint (counts seven through ten) directed at a fictitiously-designated nurse have been abandoned. *Acuna v. Turkish* ("*Acuna I*"), 808 A.2d 149, 151 (N.J. Super. Ct. App. Div. 2002).

On May 1, 2001, the Honorable Douglas T. Hague, J.S.C. granted Respondents' motion for partial summary judgment and dismissed counts one through five asserting claims for wrongful death, survivorship and emotional distress.

Following leave granted, the Superior Court of New Jersey, Appellate Division (the "Appellate Division") affirmed the dismissal of counts one and two, the wrongful death claims, but reversed and remanded on

count five, the emotional distress claim, holding that if Petitioner established her claim for medical malpractice, this would constitute a direct tort against Petitioner which would entitle her to emotional distress-based damages. *Acuna I*, 808 A.2d at 151.

Petitioner did not appeal the dismissal of the survivor claims (counts three and four), *ibid*, and later abandoned them. *See Acuna v. Turkish* ("*Acuna II*"), 894 A.2d 1208, 1211 n.2 (N.J. Super. Ct. App. Div. 2006).

Following remand and extensive discovery, Respondents moved for summary judgment on the remaining claims of emotional distress (count five) and negligence (counts six and eleven).

On March 3, 2004, the Honorable Amy Piro Chambers, J.S.C., dismissed Petitioner's remaining claims alleging negligence, medical malpractice and emotional distress. *Acuna II*, 894 A.2d at 1212. On appeal, the Appellate Division reversed and remanded, "for reasons entirely different from those advanced in Acuna's brief." *Id.* at 1213. However, it declined to reconsider its prior decision affirming dismissal of Petitioner's wrongful death claims. *Id.* at 1215.

Prior to remand, however, the Supreme Court of New Jersey granted Respondents' Petition for Certification regarding the negligence and emotional distress issues addressed in *Acuna II*; it subsequently reversed the Appellate Division and reinstated the order of the trial court dismissing these claims, holding that that there is "no common law duty requiring a physician to instruct the woman [seeking an abortion]

that the embryo is an 'existing human being' and suggesting that an abortion is tantamount to murder." *Acuna v. Turkish* ("*Acuna III*"), 930 A.2d 416, 418 (N.J. 2007). This Petition followed.

Separately, in response to Respondents' request for review by the New Jersey Supreme Court concerning the negligence and emotional distress claims, Petitioners filed an appeal asserting "a substantial constitutional question" arising out of the dismissal and denial of the wrongful death claims, entitling Petitioner to an appeal "as of right" under the applicable Rule of Court. However, the New Jersey Supreme Court dismissed Petitioner's appeal of the wrongful death arguments as not presenting a substantial constitutional question. 915 A.2d 1045 (N.J. 2007). In October 2007, this Court denied *certiorari*. 128 S. Ct. 181 (2007).

REASONS FOR DENYING THE PETITION

This Petition should be rejected because this Court lacks jurisdiction to consider a final judgment of the Supreme Court of New Jersey that is based solely on the state's common law doctrine of informed consent, a particular species of medical malpractice negligence. This decision is both independent of any alleged federal question raised by the Petitioner, and adequately supported by the weight of New Jersey common law. Indeed, the court below specifically stated that it did not consider any federal constitutional arguments in reaching its decision: "[w]e need not reach the constitutional arguments . . . because we cannot find that New Jersey's common law imposes a legal duty on a physician to give the instructions sought by plaintiff."

Acuna III, 930 A.2d at 427. Where, as here, the judgment of a state court rests solely on local law which is independent of the Constitution, treaties or laws of the Untied States, this "adequate and independent" state law deprives the Court of jurisdiction under 28 U.S.C. § 1257. Accordingly, this Court lacks jurisdiction to consider the Petition.

Even if *arguendo*, the Court had jurisdiction, the Court should nevertheless refuse to review the decision below because, contrary to Petitioner's assertions, it does not conflict with this Court's decisions in *Roe v. Wade*, 410 U.S. 133 (1973) or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). (Petr.'s Br. at 21-26.) Similarly, the decision below does not conflict with any decision from any Courts of Appeals. In this regard, the Third Circuit has specifically, and repeatedly, repudiated Due Process and Equal Protection arguments that are nearly identical to those advanced by Petitioner in this application. *See Marie v. McGreevey*, 314 F.3d 136 (3d Cir. 2002), *cert. denied*, 539 U.S. 910 (2003); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir.), *cert. denied*, 522 U.S. 949 (1997). There are no conflicting decisions in other Circuits.

In sum, because this matter has been decided upon independent and adequate state law grounds, this Court may not exercise jurisdiction under 28 U.S.C. § 1257. Moreover, there are no compelling reasons, as required by Sup. Ct. R. 10, to grant this petition which should be denied.

I. This Court Lacks Jurisdiction To Consider This Matter, As the Decision Below Presents No Federal Question Which Was Passed Upon and Rests On State Law Grounds that Are Independent of the Alleged Federal Question and Adequate to Support the Judgment.

Petitioner has failed to meet the procedural and substantive jurisdictional prerequisites to obtain review of a state court judgment. In this regard, Petitioner's entire argument concerning jurisdiction is a single sentence: "This Court has jurisdiction under 28 U.S.C. § 1257." (Petr.'s Br. at 2.) This is insufficient under Sup. Ct. R. 14(1)(g)(i) which requires that a petition for a writ of certiorari seeking review of a state court judgment contain:

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph

> are voluminous, they shall be included in the appendix referred to in subparagraph 1(i). [*Ibid.*]

Although Petitioner now alleges that she raised federal claims below in conjunction with the informed consent theory of her case (Petr.'s Br. at 4-5) the court below considered these arguments exclusively in the context of New Jersey common law which controls such causes of action. *See Acuna III*, 930 A.2d at 423 ("[t]he issue before this Court, framed by plaintiff in her complaint and throughout the litigation, is whether defendant failed to provide her with material information concerning . . . her pregnancy"). The only federal constitutional matters noted below concern Petitioner's argument that New Jersey's wrongful death statute denied her equal protection because it precluded pecuniary compensation for the death of a fetus. *Id.* at 421. *See also Acuna I*, 808 A.2d at 149 (relying on *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) and affirming dismissal of Petitioner's wrongful death claims), *appeal dismissed*, 915 A.2d 1045 (N.J. 2007), *cert. denied*, 128 S. Ct. 181 (2007)). That issue was presented to this Court on an earlier petition, resulting in the denial of *certiorari.* 128 S. Ct. 181 (2007).

In a context separate from the wrongful death issue, the court below specifically stated that it had not considered any constitutional arguments – whether federal or state – in arriving at its decision: "[w]e need not reach the constitutional arguments. . . . because we cannot find that New Jersey's common law imposes a legal duty on a physician to give the instructions sought by plaintiff." *Acuna III*, 930 A.2d at 427.

Moreover, there is no basis for this Court to exercise direct-review jurisdiction of a state court judgment under 28 U.S.C. § 1257(a) for the simple reason that Petitioner cannot establish that a federal question exists, and that it was raised *and* actually decided by the New Jersey Supreme Court. *Acuna III*, 930 A.2d at 427; *Crowell v. Randell*, 35 U.S. 368, 392 (1836) ("If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist, and were made"). *See also Berry v. Mississippi*, 128 S. Ct. 528 (2007) (judgment of state court relying on adequate and independent state ground deprives Court of jurisdiction); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (stating that Court lacks jurisdiction to decide "question[s] of federal law decided by state court if the decision of that court rests upon a state law ground which is independent of the federal question and adequate to support the judgment"); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (no jurisdiction where state courts resolve issue on independent and adequate state law ground).

This matter is therefore similar to those cases described in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983):

> [i]f a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases

> are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Without question the decision below of the New Jersey Supreme Court is rooted in that state's common law doctrine of informed consent, a particular species of medical malpractice negligence. This decision is both independent of any alleged federal question raised by the Petitioner, and adequately supported by the weight of New Jersey common law. Accordingly, this Court lacks jurisdiction to consider the Petition, which should be denied.

In New Jersey, informed consent is a negligence concept "predicated on the duty of a physician to disclose to a patient such information as will enable the patient to make an evaluation of the nature of the treatment and of any attendant substantial risks, as well as of available options in the form of alternative therapies." *Largey v. Rothman*, 540 A.2d 504, 507 (N.J. 1988).

To sustain a claim based on lack of informed consent, the patient must prove: (1) that the doctor withheld material "medical information" which concerns the risks of the procedure or treatment or the alternatives or the

potential consequences if the procedure or treatment is not undertaken; (2) that the undisclosed risk occurred and harmed the patient; (3) that a "reasonably prudent patient" in the plaintiff's position would have declined the treatment if informed of the undisclosed risks; and (4) that the procedure or treatment was a proximate cause of the plaintiff's injuries. *Howard v. Univ. of Med. and Dentistry of N.J.*, 800 A.2d 73, 79 (N.J. 2002).

Largey also sets the polestar of New Jersey's doctrine of informed consent by defining "material risk" in this context, saying: "a risk would be deemed 'material' when a reasonable patient, in what the physician knows or should know to be the patient's position, would be 'likely to attach significance to the risk or cluster of risks' in deciding whether to forego the proposed therapy or to submit to it. *Largey*, 540 A.2d 504 (quoting *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972). Generally, the duty is fulfilled where a physician informs the patient of the available medical options, the risks associated with those options, and the nature of the intended procedure. *Howard*, 800 A.2d at 79.

As this discussion demonstrates, the doctrine of informed consent is a creature of New Jersey's common law that has evolved and adapted from pre-colonial English common law to the twenty-first century. *See Largey*, 540 A.2d at 507 (citing *Slater v. Baker & Stapleton*, 95 Eng. Rep. 860 (K.B. 1767)). The New Jersey Supreme Court's decision below in *Acuna III* is based exclusively upon this doctrine, as is evident from the second paragraph of the opinion that frames the

issues raised below by Petitioner squarely and exclusively within the context of informed consent:

> [a]lthough a physician unquestionably has *a common law duty* to provide a woman with material information concerning the medical risks of a procedure terminating a pregnancy, we know of *no common law* duty requiring a physician to instruct a woman that the embryo is an "existing human being," and suggesting that an abortion is tantamount to murder.

Acuna III, 930 A.2d at 418 (emphasis supplied). Following a detailed review of the facts and procedural history of this case, *id.* at 418-423, the court below articulated the issue presented by the Petitioner, again invoking the common law rubric of informed consent, saying: "[t]he issue before this Court, as framed by plaintiff in her complaint and throughout this litigation, is whether the defendant failed to provide her with material medical information concerning the nature of the six-to-eight-week old embryo she was carrying and the consequences of her terminating her pregnancy." *Id.* at 423. The court again emphasized that its analysis was based solely on the common law of informed consent when it considered the issues raised in the case:

> [u]ltimately, we must decide whether, *under the common law duty to obtain informed consent*, a physician is required to advise a woman, who is in the sixth to eighth week of pregnancy, that an abortion procedure will kill not just a potential life, but an actual existing human being.

Id. at 424 (emphasis added). Consistent with *Largey* and *Howard*, *Acuna III* correctly articulates the legal

definition of informed consent and summarizes the Petitioner's burden to "demonstrate that a physician withheld *medical information* that a reasonably prudent pregnant woman in like circumstances would have considered material before consenting to a termination of pregnancy. *Id.* at 425 (emphasis in original). *See Largey*, 540 A.2d at 504 (defining "material risks" as those "a reasonable patient, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether to forego the proposed therapy or to submit to it" (internal quotation omitted)); *Howard*, 800 A.2d at 78 (stating that the "patient must prove that the doctor withheld pertinent medical information concerning the risks of the procedure"); *Blazoski v. Cook*, 787 A.2d 910, 919-20 (N.J. Super. Ct. App. Div.), *cert. denied*, 796 A.2d 181 (N.J. 2002) (holding that "[a]ctions for informed consent are limited to the nondisclosure of medical information" and that only "material medical information" need be disclosed to obtain informed consent, finding no duty to advise a patient of the FDA class III classification status of medical devices such as pedicle screws).

The New Jersey Supreme Court in *Acuna III* similarly concluded that the "instructions" which Petitioner urged disclosure of below "are certainly not the medical professional norm within this State." *Acuna III*, 930 *A*.2d at 416. Consequently, the court concluded that

> we cannot find that New Jersey's *common law* imposes a legal duty upon physicians to give the instructions sought by plaintiff. . . .

> [W]e do not find that the *common law* commands a physician to inform a pregnant patient that an embryo is an existing living human being and that an abortion results in the killing of a family member.

Id. at 419-20 (emphasis added).

There is no federal question presented by this matter. Nor was one passed upon below. The Petition therefore lacks the necessary elements – that a federal question exists, was raised *and* actually decided by the New Jersey Supreme Court – which are required for this Court to exercise direct-review jurisdiction under 28 U.S.C. § 1257(a). *See Coleman*, 501 U.S. at 729; *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Under these circumstances, there is no basis for this Court to exercise jurisdiction and the Petition should therefore be denied.

II. This Court Should Also Decline Jurisdiction Because the Alleged Federal Question Is Neither "Important" Nor "Substantial" and Does Not Conflict With the Federal Constitution or With the Decisions of this Court or of the Courts of Appeals.

Even if *arguendo*, Petitioner could establish that this Court has jurisdiction, the Court nevertheless should decline to review the decision below. It is well-settled that when considering review of a state-court decision, the mere allegation of a federal question alone is insufficient. Review should nonetheless be denied where "the questions on which the decision depends are so wanting in substance as not to need further

argument." *Hodges v. Snyder*, 261 U.S. 600, 601 (1923). *See also Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902) (stating that "it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction"); Sup. Ct. R. 10(b) and –(c) (incorporating this "important federal question" requirement into criteria used to evaluate petitions for *certiorari*).

Petitioner claims that the "importance" of the alleged federal question arises from the conflict between *Acuna III* and federal decisions from this Court and the Third Circuit. (Petr.'s Br. at 14, 21.) Analysis of these cases, however, leads to the contrary conclusion: that there is no conflict between *Acuna III* and the decisions of this Court and the Courts of Appeals, including the Third Circuit as cited by the Petitioner.

In *Casey*, the Court recognized the importance of the State's "interest in *potential life*" and scrupulously avoided describing an embryo or a fetus as an "existing human being" as Petitioner contends. 505 U.S. 833, 875-76 (1992) (emphasis added). More recently, the Court has reaffirmed that "[b]efore viability, a state 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626 (2007) (quoting *Casey*, 505 U.S. at 879). Even after *Casey* and *Gonzales*, pre-viability abortion procedures remain legally permitted and constitutionally protected although subject to governmental regulation so long as no "undue burden" is imposed. *Id.* at 1639. The conclusion in *Acuna III* that that New Jersey common law does not require physicians to inform women that an abortion will kill an

existing family member in no way conflicts with these precedents.[1]

Similarly, *Acuna III* presents no conflict with recent decisions in the Third Circuit, which have considered the same or similar issues advanced by Petitioner below. The leading case in this regard, *Alexander*, 114 F.3d 1403-04, contrary to Petitioner's argument, does *not* hold "that the question of whether or not a fetus or embryo is a human being, in the scientific sense, was a question of fact to be determined by a fact finder." (Petr.'s Br. at 21.) Rather, *Alexander* rejected the argument (made by the same counsel representing Petitioner) that stillborn fetuses are human beings entitled to equal protection under the Fourteenth Amendment). *Alexander*, 114 F.3d at 1400-01, 1407 (affirming dismissal of claim that New Jersey wrongful death and survivor statutes violate federal guarantees of equal protection and due process – by allowing wrongful death actions for child born alive who then dies, but not for an embryo or fetus that dies *in utero* – and holding that that "born-alive" rule is rationally related to the state's interest in defining its own tort law). The Third Circuit in *Alexander* specifically "declined to determine whether a mother's relationship with her unborn child during pregnancy is a fundamental

---

1. Of course, each of us is free to conclude that an embryo should be considered equivalent to a human being or "person" based on individual moral, philosophical, and religious beliefs. As this Court stated in *Casey*: "at the heart of liberty is the right to define one's own concept of the meaning of existence . . . and of the mystery of human life." 505 U.S. 833, 851 (1992).

interest," *id.* at 1403-04, a proposition assumed and taken for granted by Petitioner throughout her papers.[2]

In another case – *Marie v. McGreevy* – related to this one which also involved Petitioner as a plaintiff (and again, the same counsel), the plaintiffs requested a declaration that New Jersey's criminal and civil laws permitting abortion violated due process and equal protection; a declaration that every human being including fetuses "'enjoy protection under the Equal Protection Clause'"; and an injunction requiring New Jersey regulations, *inter alia*, to recognize embryos "as a human being" and to require that physicians inform a

---

2. Petitioner's also incorrectly distorts *Acuna I* by claiming that it "understood the *Alexander* Court's [*sic*] decision to clearly recognize that the fact that whether the 'unborn' are human beings, is a question of fact, but that the legal definitions of 'person' control the legal rights of such human beings." (Pet. Br. at 24.) Read in context, nothing in *Alexander* supports Petitioner's assertion that she was entitled to a jury trial and that her claim could not properly be disposed of on a motion as a matter of law.

Moreover, the portion of *Acuna I* relied upon merely summarizes the Petitioner's constitutional challenges to the New Jersey Wrongful Death Act (the "Act"), as applied in *Giardina*, 545 A.2d at 139 (holding that the Act "does not permit recovery attributable to the wrongful death of an infant before birth"). Thus viewed, *Acuna I* does not stand for the proposition which Petitioner claims. To the contrary, it explicitly rejected the same constitutional challenges raised in *Alexander* and *Marie* which, in the context of this litigation, were denied review by both the New Jersey Supreme Court and this Court. *See Acuna v. Turkish*, 915 A.2d 1045 (N.J.) (appeal dismissed as to wrongful death claims), *cert. denied*, 128 S. Ct. 181 (2007).

woman seeking abortion care that "'her child is already in existence,'" and is a "'complete, separate . . . unique'" human being. 314 F.3d at 142-43. The plaintiffs also sought to require that the pregnant woman view a sonogram and listen to the heartbeat. *Ibid.*

All this relief was denied. Astonishingly, Petitioner does not cite to *Marie* in her papers submitted to this Court. Nevertheless, below, Petitioner had asserted that the Third Circuit in *Marie* simply held that the Fourteenth Amendment did not require the State to make these disclosures as a matter of substantive due process and did not reach an equal protection argument. [Pl Supp B at 57.] This is inaccurate. The Third Circuit examined the claim of "fundamental interest" in the woman's relationship with the embryo in the context of New Jersey's Wrongful Death Act and held "the New Jersey Wrongful Death Act did not, as a general matter, violate the Equal Protection Clause by classifying women according to whether their children survived birth." *Id.* at 140-41. *Acuna III* is fully consistent with both *Alexander* and *Marie* decisions.

More recently, the Eighth Circuit, sitting *en banc*, dissolved a District Court's preliminary injunction of a South Dakota statute mandating that a doctor disclose to patients seeking an abortion information similar to the "biological facts" alleged by this Petitioner. *Planned Parenthood v. Rounds*, 2008 U.S. App. LEXIS 13564, *5 (8th Cir. June 27, 2008). The South Dakota statute requires, as a *sine qua non* of informed consent in the abortion context, that a physician inform the patient that "the abortion will terminate the life of a whole, separate,

unique living human being," *S.D. Codified Laws*, § 34-23A-10.1(1)(b) (2008), that the woman has "an existing relationship with that unborn human being" *id.*, § 34-23A-10.1(1)(c) (2008), and that "by having an abortion, her existing constitutional rights with regards to that relationship will be terminated." *Id.*, § 34-23A-10.1(1)(d) (2008). Further, it defines a "human being" as an "individual living member of the species of *Homo sapiens*." *Id.*, § 34-23A-1(4) (2008). In upholding the South Dakota statute against a constitutional challenge, the Eighth Circuit relied on this statutory definition. 2008 U.S. App. LEXIS 13564, *23, 30-31:

> Once one accepts that the required disclosure must take into account the limiting definition in § 8(4), the evidence submitted by the parties regarding the truthfulness and relevance of the disclosure in § 7(1)(b) generates little dispute. The disclosure actually mandated by § 7(1)(b), in concert with the definition in § 8(4), is "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being," § 7(1)(b), and that "human being" in this case means "an individual living member of the species of Homo sapiens . . . during [its] embryonic [or] fetal age[]," § 8(4).
>
> . . .
>
> [T]he Act, when read in light of the nonmisleading statutory definition of "human being," does not require a physician to address whether the embryo or fetus is a

> "whole, separate, unique" "human life" in the metaphysical sense.

The Eighth Circuit upheld this statute as relating to the practice of medicine which was subject to licensure requirements and regulation by the State.

In a dictum, the New Jersey Supreme Court observed that the South Dakota statute involved in *Rounds* may be "pushing the doctrine of informed consent to the edge of a new constitutional fault line," *Acuna III*, 930 A.2d at 419, either as an "unnecessary health regulation[]" which has the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion" and therefore imposes an "undue burden" on the right, *Casey*, 505 U.S. at 837, or as matter of compelled speech under the First Amendment.[3] However, this has no relevance to this Petition, as the New Jersey Supreme Court explicitly said, "[w]e need not reach the constitutional arguments raised by defendants and *amici* that it is both an undue burden . . . and a violation of a physician's First Amendment [rights]." *Acuna III*, 930 A.2d at 419.

More significantly, unlike South Dakota, there is no statutory basis in New Jersey law on which Petitioner can base her purported disclosures and the "non-metaphysical" definition of human being equating the term only to "a member of the species *Homo sapiens*."

---

3. As observed by Justice O'Connor, "[i]nformed-consent provisions may . . . violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology." *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting).

Indeed, despite the proliferation of legislation elsewhere regulating abortion procedures (whether or not similar to South Dakota's), the elected representatives of the people of New Jersey have not enacted any such statutory provision. Although some state representatives have introduced bills requiring certain counseling prior to an abortion, these have never passed. *See* Assemb. B. 1405, 211th Leg., 2004-05 Sess. (N.J. 2004), Assemb. B. 2275, 209th Leg., 2000-01 Sess. (N.J. 2000), S.B. 811, 208 Leg., 1998-1999 Sess. (N.J. 1998). Nor is there any regulatory requirement to this effect from the New Jersey State Board of Medical Examiners. This diversity of approach is fully compatible with principles of federalism. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting). The disclosures regarding an abortion procedure required to be made by a physician in New Jersey are measured by the standards of the common law.

Accordingly, the decision below is consistent with the federal Constitution, decisions of this Court, and decisions of the Court of Appeals. This Court should deny review.

Contrary to the arguments of Petitioner, *Acuna III* does not misconstrue or pervert *Roe* into a vehicle through which physicians are permitted to intentionally mislead women as to the true nature of the abortion procedure. Indeed *Roe* is inconsequential to the resolution of "[t]he issue . . . as framed by plaintiff in her complaint and throughout the litigation . . . [of] whether defendant failed to provide her with material *medical information* concerning the nature of the six-

to eight-week-old embryo she was carrying and the consequences of her terminating her pregnancy." *Acuna III*, 930 A.2d at 432 (emphasis supplied). *See also Blazoski*, 787 A.2d at 919 (stating that "New Jersey cases have fixed the contours of a patient's informed consent by focusing on the nature of, and risks and benefits of the treatment, the condition the treatment is intended to correct, the availability of other options, and the risks and likely outcomes of those alternatives").

The "human being" disclosure urged by Petitioner, though speaking with a veneer of biology and claiming the imprimatur of science, seeks to communicate a viewpoint laden with philosophical, religious and moral judgment: that every abortion is tantamount to murder. *See Acuna III*, 930 A.2d at 418 ("we know of no common law duty requiring a physician to instruct a woman that the embryo is an 'existing human being,' and suggesting that an abortion is tantamount to murder.")

The insidiousness of the "human being" disclosure advanced by Petitioner is also revealed by the accompanying descriptive adjectives "whole, separate, irreplaceable, and unique." These terms modify "human being" and are advanced by Petitioner as matters of scientific fact. (Petr.'s Br. at 17-19.) But the terms "whole, separate, irreplaceable, and unique" are completely devoid of any biological or scientific content, and to the extent that they may be given medical meaning, they appear "obviously false." Post, *Informed Consent To Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 959 n.100 (2007) (citing Green, *Determining Moral Status*, 2 Am. J. Bioethics 20, 20 (2002) (stating

that "[B]iological occurrences are processes rather than events. Nature rarely, if ever, presents definitive transitions from one state to another")). Petitioner's arguments point to societal ills such as abuse, poverty or lack of education as traumas against woman and offer control of women as a panacea for these injustices. The proffered "informed consent" script is designed to frighten and shame women into carrying pregnancies to term. Regulation of informed consent is a means by which Petitioner seek to disseminate propaganda as purported "knowledge" rather than actual of medical care. Post, *Informed Consent to Abortion* at 972. Applying the matrix of New Jersey's law of informed consent, there is clearly no duty to impart non-medical information such as this. *See, e.g., Blazoski*, 787 *A*.2d at 919-20 (finding no duty to advise a patient of non-medical information in the form of the FDA class III classification status of medical devices such as pedicle screws).

These arguments which threaten the modern understanding of women's citizenship in the United States far beyond the abortion controversy are unsupportable under modern notions of constitutional dignity and self-determination. Informed consent in New Jersey and elsewhere safeguards all patients' rights to make decisions about their treatment based upon available medical information. *See Largey*, 540 A.2d 505-06 (stating that "[e]very human being of adult years and sound mind has the right to determine what shall be done with his [or her] own body"). Tautological or ideological statements that convey no medical information but serve only to humiliate and degrade women have no place within this doctrine or within the federal jurisprudence concerning abortion rights. It is

therefore Petitioner's rhetoric that openly conflicts with *Gonzales*, 127 S. Ct. at 1626, *Casey*, 505 U.S. at 879 and *Roe*, 410 U.S. at 159, and not the common law of informed consent in New Jersey or the decision in *Acuna III*. Accordingly, there is no "substantial" or "important" federal question presented by this Petition.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition in this matter be denied, and this matter dismissed.

Respectfully submitted,

JOHN ZEN JACKSON
Counsel of Record
LEONARDO M. TAMBURELLO
KALISON, MCBRIDE, JACKSON
& MURPHY, P.C.
25 Independence Boulevard
Warren, New Jersey 07059
(908) 647-4600

Counsel for Respondents